Opinions Below.

The opinion of the Court of Appeals, *infra*, p. 28, is not yet reported. The order of the Federal Power Commission is reported at 22 F. P. C. 378 (R. 87-110).* The Commission's denial of rehearing is reported in 22 F. P. C. 657 (R. 123-125).

Jurisdiction.

The judgment of the Court of Appeals was entered on December 8, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) and §19(b) of the Natural Gas Act, 15 U. S. C. §717r(b).

Questions Presented.

After "*Catco*" (*Atlantic Refining Company* v. *Public Service Commission*, 360 U. S. 378, decided June 22, 1959), the Federal Power Commission on August 10, 1959 issued unconditioned certificates of public convenience and necessity under §7(e) of the Natural Gas Act [15 U. S. C. §717f(e)] to twenty-one independent producers authorizing sales to Hope Natural Gas Company of natural gas produced from various fields in southern and offshore Louisiana. After analyzing the record in the light of *Catco*, the Commission held that the producer applicants had fully sustained their burden of proving that the proposed sales at the initial contract prices are required by the public convenience and necessity (R. 103).

The Commission found from the evidence that the producers' applications did not signal the existence of a situation which would be contrary to the public interest; and the prices were not "out of line" nor will they set a new price plateau in southern Louisiana (being the same or lower than numerous other certificated sales in the area), will result in no triggering, and will have no adverse effect

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* These references are to the numbers appearing at the bottom of the pages of the Joint Appendix filed herewith.

on other purchasers. The Commission also found there will be no increase in the purchaser's existing rates to its customers nor will these purchases increase the purchaser's weighted average cost of gas; that the purchaser and its customers have an urgent need for the gas (R. 100-107).

In addition to concluding that the prices were "in line" with and below a substantial number of prices in the area certificated after the Commission's order in the *Catco* proceeding (June 24, 1957), the Commission also concluded that the prices did not exceed producers' initial prices of 20¢ per Mcf (exclusive of tax reimbursement) accepted by it in 1953 and approved by it in 1954 and 1955 when consideration is given to inflation, increased labor and material costs, the type of terrain in which the wells were located, and the depths of the wells.

The court below, observing that "the evidence was taken before [this] court's opinion" in *Catco* (an erroneous assumption—R. 91), held that the Commission's determination "is unsupported by substantial evidence in the record, and cannot stand" (*infra*, pp. 31, 32). The court construed *Catco's* "tenor" to require a producer applicant for a certificate to establish the proposed price as the "*lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest*" (*infra*, p. 32), and thereupon concluded that "[w]e find *nothing* in the record before us which would justify the conclusion that the Commission has adequately performed [its duty under *Catco*]" (*infra*, pp. 32-33). (Emphasis supplied here and throughout.)

The Court of Appeals, in reversing the Commission, did not even allude to the second and independent ground (1953, 1954 and 1955 prices) on which the Commission based its finding that the proposed prices were not "out of line".

The questions presented are:

1. Whether the Court of Appeals correctly construed and properly applied the *Catco* decision, and, particularly, whether *Catco's* "tenor" precludes the Commission in a producer certificate proceeding from issuing an unconditioned certificate unless the applicant proves that the pro-

posed initial price is the "lowest possible reasonable rate", and thus invokes the "just and reasonable" rate standard of §4 and §5 into §7 certificate proceedings.

2. Whether, in performing its certificating function in the light of *Catco*, the Commission's choice of a standard by which to ascertain alignment of proposed producer prices, and its application of that standard herein, was a reasonable exercise of judgment which should not have been set aside by the Court of Appeals.

3. Whether, assuming a negative answer to Question 2, the Commission's order in the instant circumstances was based on substantial evidence, or did the Commission abuse its discretion in not attaching a price condition.

Statute Involved.

This case involves primarily §7(e) of the Natural Gas Act, 15 U. S. C. §717f(e). That section and §7(c) of the Act, 15 U. S. C. §717f(c), are reproduced in Appendix "A" hereto.

Statement.

1. Applications were filed with the Commission by twenty-one independent producers seeking certificates under §7(c) of the Act [15 U. S. C. §717f(c)] to sell under long term contracts to Hope, gas to be produced in southern and offshore Louisiana. The project will not require Hope to install any facilities. The gas will be transported for Hope from the fields by Texas Gas Transmission Corporation and Texas Eastern Transmission Corporation.[1]

A hearing on the applications began on June 10, 1959 and concluded on June 25, 1959, *three days after Catco*. The Public Service Commission of the State of New York, respondent here, participated in the hearing as an intervenor and cross-examined some of the applicants' witnesses, but presented no testimony or evidence in opposi-

[1] These companies applied for certificates and their applications were consolidated with those of the producers and Hope.

tion or rebuttal and the facts of record are not disputed. The Commission's Staff also participated in the hearing.

None of Hope's customers intervened in opposition to the producers' applications.[2]

2. Most of the producer contracts provide for initial prices of 21.5¢ per Mcf, with four at initial prices of 21¢ per Mcf. All provide for 2.05¢ per Mcf tax reimbursement. In total the contracts which are for terms of twenty years (a few for twenty-one) commit to Hope gas produced from proved reserves in the order of 600 billion cubic feet (R. 32, 72-73).

3. The following undisputed evidence is established by the record, upon which the Commission made appropriate findings (R. 100-107):

(1) Hope and its customers have an urgent need for the gas (R. 34-44, 48, 53-54).

(2) The prices proposed by the producers:

(a) Are not out of line with going prices (both in interstate and intrastate sales) in southern or offshore Louisiana (R. 18-24, 25, 27, 33, 60, 62, 63-66, Exh. 32 following R. 76);

(b) Will not trigger any price rises in the area (Id.);[3]

(c) Are only equal to or lower than many other permanently certificated prices to other interstate pipelines in the area (R. 60-66);[4]

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[2] The gas will be delivered initially to affiliates of Hope. The Consolidated System, which consists of Hope and its affiliates, supplied gas at wholesale (at the end of 1958) to *non-affiliated* gas companies serving 335 communities in New York, Pennsylvania and West Virginia (R. 37).

[3] It is also noteworthy that the instant prices are at or below the initial price level established by the Commission's *Statement of General Policy, No. 61-1*, as amended, issued September 28, 1960 (18 C. F. R. §2.56).

[4] See, *e.g.*, *Southern Natural Gas Co.*, 19 F. P. C. 558 (approving base prices in southern Louisiana of 21.5¢ per Mcf plus tax reimbursement up to 2.175¢ per Mcf); and *Trunkline Gas Co.*, 21 F. P. C.

(d) These are Hope's first purchases in Louisiana and will not trigger any price increase in any other contract to Hope (R. 63);

(e) Will have no increasing or triggering effect on any other purchasers of gas (R. 63).

(3) These large supplies, about 100,000,000 cubic feet per day, will be laid down at existing delivery points in the Appalachian area to Hope's customers at a cost to Hope of between 3¢ and 5¢ per Mcf *less* than its effective rates at the date of hearing to those same customers (R. 49).[5]

(4) No additional facilities will be required by Hope in the consummation of this project (R. 53).

(5) This entire project, if certificated as proposed, will not cause an increase in Hope's rates and will have no adverse financial impact on Hope's customers, and this project could not support an increase in Hope's rates (R. 54-56).

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704 (approving base prices of 22¢ per Mcf plus tax reimbursement). *These orders are final*, although *Trunkline* was on review on a procedural question at the date of the Commission's order herein. Additionally, in Opinion No. 325, issued August 7, 1959 (*South Georgia Natural Gas Co., et al.*, 22 F. P. C. 211) the Commission permanently certificated sales in southern Louisiana at base prices of 21.5¢ per Mcf, exclusive of tax reimbursement. *This order is final.*

[5] The total cost to Hope at the delivery points where this gas will be delivered to its customers is 44.825¢ per Mcf; whereas, Hope's effective rates at the date of hearing to those same customers were: The East Ohio Gas Co.—50.63¢ per Mcf; The Peoples Natural Gas Co.—48.19¢ per Mcf; New York State Natural Gas Corp.—48.19¢ per Mcf; The River Gas Co.—48.19¢ per Mcf (R. 49). On October 31, 1960, subsequent to the argument in the court below, Hope filed a rate increase (F. P. C. Docket No. RP 61-14), which, as shown in the filing, was necessitated by circumstances, including increases in other costs, *wholly unrelated to the costs of the instant supply.*

(6) Not a single customer of Hope has intervened in opposition to the producers' proposed prices (R. 106).

(7) Hope's prices to the producers will be definitely known for at least 8 years, and in some cases 12 years. No price redetermination can be had before then (R. 32).

(8) The producer contracts do not contain favored nation clauses (R. 32).

(9) The fixed escalation is 1¢ per Mcf each 4 years, rather than 2¢ each 4 years as in some other permanently certificated (and final) sales in the same area to another pipeline (R. 33).

(10) Hope entered the Louisiana gas supply market to supplement existing sources of supply to meet increasing demand (R. 39). Among Hope's sources of supply are purchases of gas in the field in the Appalachian area. During the year 1958 the average cost to Hope in the field for the Appalachian gas was 24.05 cents per Mcf (R. 51), or one-half cent per Mcf higher than the highest price, including tax reimbursement, at which Hope purchased the instant gas.

(11) There is no affiliation between Hope and any of the producers, the contracts were the result of intensive arm's-length bargaining, and Hope was unable to buy gas at a lesser price (R. 44-47).

After evaluating the record, the Commission concluded (R. 105-106):

> "We find nothing in the evidence that signals the existence of a situation which would indicate that the issuance of a permanent certificate is not in the public interest. The proposed price is not out of line with other prices currently being charged in Louisiana, nor, as we have shown, is it out of line with the pre-Cateo prices, particularly when we consider the increase in the costs of producing gas, the location of the fields here involved, and the depth of the sands from which the gas is produced. Certification at these prices will not result in any triggering, there

will be no increase in Hope's existing rates to its customers, nor will there be any increase in the weighted average cost of Hope's gas.

"On the contrary, considering the need of Hope for this gas, the fact that it has been unsuccessful in locating gas for its customers in its own exploration activities in south Louisiana and has been unable to purchase any at a lesser price * * * and the fact that every other aspect of the public convenience and necessity has been met, we conclude that the public convenience and necessity requires the issuance of the producer applications at the proposed prices. To deny these supplies to Hope would be a disservice to all of the consumers dependent upon it for their gas."

4. The hearing before the Presiding Examiner concluded *three days after Catco was announced by this Court.*[6] The Commission waived intermediate procedure to expedite Hope getting the needed gas (R. 66-69). Oral argument was had before the Commission on July 21, 1959, or about

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[6] This Court's opinion in *Catco* was specifically noted during the hearing, and certain testimony related directly to the "out of line" question. At the hearing session of June 25, 1959, during colloquy as to whether the Commission's Staff intended to recommend a price condition, the Staff Counsel remarked (p. 1647 of official transcript—this portion of the transcript was not included in the Joint Appendix, but is part of the official record of the proceeding and can be made available to the Court if certiorari is granted):

"Mr. Examiner, in view of the recent decision in the CATCO proceedings that has come down, I think it would be unwise for me to attempt to take a position at this time * * *."

The Presiding Examiner observed (*id.*):

"I can understand that * * *. On the rate condition issue I think because of the fact that the Supreme Court only so recently issued the CATCO decision, it would not be surprising to me if the staff were to be interested in considering the matter further before they decided what position they would take on this issue."

Later that same day (June 25, 1959) and with obvious reference to *Catco*, a staff witness conceded on cross examination that sales involved here covering gas in the Bayou Pigeon Field were "not out of line" with the price in previously certificated sales in that very same field, and which prior certificates are final in that the order issuing them is not subject to review (R. 63-66).

one month after *Catco*. On August 10, 1959, the Commission issued the order involved here, which was followed by review in the court below under §19(b) of the Act. The Court of Appeals reversed the Commission and remanded "* * * for further proceedings in which the producer applicants may, if they so choose, either augment the record so as to support a certification without price condition, or seek a certification appropriately conditioned" (*infra*, p. 33).

While the Court of Appeals noted that the Commission "purports to have made a determination" of the type required by *Catco*[7] (*infra*, p. 32), nonetheless it concluded that the Commission missed the real "tenor" of *Catco*, hence its order "is unsupported by substantial evidence in the record, and cannot stand" (*infra*, p. 32). The court observed that although the Commission's order was issued a month after *Catco*, "*the evidence*", the court erroneously states, "*was taken before the court's opinion was rendered* [in *Catco*], *and thus before it had become known that additional explanatory proof would be required to support inflated prices*", *infra*, pp. 31-32.[8]

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[7] The court was here referring to this Court's *per curiam* in *Public Service Commission of the State of New York* v. *Federal Power Commission*, 361 U. S. 195 (1959), frequently referred to as *Transco-Seaboard*, in which the judgment of the Court of Appeals for the Third Circuit which affirmed, after *Catco*, a pre-*Catco* order of the Commission was "vacated and the case is remanded to that court with directions to remand the case to the Federal Power Commission for reconsideration and redetermination in the light of [*Catco*]." The court below, erroneously we believe, seems to feel that the Commission's order in this case was "[d]oubtless * * * encouraged" by the Third Circuit's opinion in *Transco-Seaboard*.

[8] We are unable to account for the court's mistake in this regard. The Commission's order which the court was reviewing specifically states (R. 91): "Pursuant to notice * * *, these proceedings came on for hearing on June 10, 1959, and *the hearing was concluded on June 25, 1959.*" See, also, *supra*, p. 8, fn. 6, where it is shown that *Catco* was not only discussed during the hearing, but that evidence obviously prompted by *Catco*-and showing that the instant prices were "not out of line", was adduced three days after *Catco* was announced. On the face of the matter it is unrealistic to assume that a decision with *Catco's* importance on producers' certificate proceedings would not be fully considered by those then in the

The court below interpreted *Catco* as follows (*infra*, p. 32):

> "The *Catco* decision does not prescribe the standard of proof which must be satisfied to support an unconditional certification. Its tenor, however, is unambiguous; the opinion expressly reaffirms that it was 'the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.' *Atlantic Refining Co. v. Public Service Commission*, *supra* at 388."

With the foregoing as its premise, the Court of Appeals concluded:

> "We find *nothing* in the record before us which would justify the conclusion that the Commission has adequately performed [the duty imposed upon it by *Catco*]." *Infra*, pp. 32-33.

Reasons for Granting the Writ.

1. The meaning of *Catco* and the authority of the Commission under *Catco* present questions of general importance in the interpretation and administration of the Natural Gas Act. The consequences of the decision below are of such far-reaching impact upon such a vast number of pending and future administrative proceedings affecting the natural gas industry and the public that it is vital that the questions involved be decided finally by this Court.

This case involves the first contested certificate proceeding which was in part tried and fully briefed and orally argued to and decided by the Commission in the light of *Catco*. Actually, *Catco's* effect upon the Commission's certificating power was the crucial issue before the Com-

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midst of such a proceeding. This record, when properly analyzed, will show that the producer applicants not only were aware of *Catco's* proof requirements, but they adduced evidence specifically negating each one of *Catco's* price conditioning indicia, and established each one of *Catco's* requirements to unconditional certification.

mission and the Court of Appeals. In those circumstances and on an exhaustive record compiled at a hearing in progress when *Catco* was handed down, the Commission found the proposed sales at the initial contract prices to be fully within the public convenience and necessity. The court below differed with the Commission. Not only did the court substitute its judgment for that of the Commission on the substantiality of the evidence and the discretion left with the Commission in the performance of its certificating authority under the Act and *Catco*, it went further and read into *Catco* the "tenor" that unconditional certification is foreclosed in the absence of proof establishing that the proposed initial price is "*the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest*", *infra*, p. 32. The Court of Appeals used that "tenor" of *Catco* as the basis for its remark that the Commission had not adequately performed its duty under *Catco*.[9]

We believe the Court of Appeals was in error not only in passing over the substantial evidence in this record and substituting its judgment for that of the Commission in a matter concerning public convenience and necessity, and not even mentioning one of the two separate bases upon which the Commission's order rests, but that the court below was also wrong in its interpretation and application of the *Catco* opinion, especially in its finding of *Catco's* "tenor" as requiring "lowest possible reasonable rate" as the criterion in certificate cases.

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[9] In stating that it could find "nothing" to show that the Commission had performed this duty, the court appears to disregard the fact, which was emphasized to it in briefs, *that on the very same day the Commission issued the order in contest here it simultaneously issued a certificate order in the "Transwestern" case* (22 F. P. C. 391). In that order, *and upon the basis of Catco*, the Commission attached substantial price reducing conditions in 13 certificates issued to 11 producers for the sale of gas from New Mexico, Oklahoma and Texas. Primarily because the record in *Transwestern* was *closed before Catco*, the Commission later reopened the record to permit a rate justification, but continued the rate condition in effect. 22 F. P. C. 542.

Unless the Commission's latitude under *Catco* is set at rest by this Court, the aftermath of the meaning which the court below attributes to *Catco* will inevitably result in continuing and increasing confusion in the multitudinous producer certificate proceedings before the Commission. The magnitude of the problem and the vital importance of having the issue authoritatively resolved is apparent from the fact that in fiscal 1959 there were 1,681 new service producer certificate applications filed with the Commission (F. P. C., *Thirty-Ninth Ann. Rep.*, 1959, p. 75), and in fiscal 1960 there were 1,616 new service certificate applications filed with the Commission by independent producers (F. P. C., *Fortieth Ann. Rep.*, 1960, p. 71). As of June 30, 1960 there were pending before the Commission 2,743 producer certificate applications (*id.*). During calendar 1960 there were 1,670 applications for certificates for new service filed by independent producers and as of December 31, 1960 there were 2,789 producer certificate applications pending before the Commission (F. P. C., *Release For Publication*, No. 11,329, G-6088, issued January 31, 1961).

If, as it appears, the decision below requires the conversion of certificate proceedings into "just and reasonable" rate proceedings with their inherent delays, a breakdown in the administrative function and thus in getting gas into the interstate market, seems inevitable. Already, the Fifth Circuit in *The United Gas Improvement Co.* v. *F. P. C.*, (two cases) Nos. 18112 and 18113, decided February 22, 1961, Appendix E, *infra*, p. 56, cites the decision below in such context as to indicate that the Fifth Circuit construes this decision as authority for a "just and reasonable" determination in a certificate proceeding. *Infra*, pp. 60, 68; see also dissenting opinion, *infra*, pp. 71, 77, 78-79.

True, we petition the Court to review one Circuit's judgment where, under different records, four Circuit Courts of Appeal have reached results different from the Commission as to five certificate orders (including the instant one) issued on August 10, 1959 dealing with gas from southern Louisi-

ana.[10] Yet, while the four Circuits reach the same *result* and apply, in part, similar reasoning, they expound such different approaches as to make clear that they themselves are in disagreement as to *Catco's* true meaning. Thus it seems inevitable that neither the Commission nor the thousands of producer applicants who have or will have certificate proceedings before it can possibly make a reasonable appraisal of *Catco's* true "tenor" or what must be established in order to obtain permanent certificates.

Particularly is the foregoing true as to the "lowest possible reasonable rate" tenor announced by the court below and apparently taken by the Fifth Circuit as at least precedential persuasion for injecting "just and reasonable" rate determinations into certificate proceedings.[11]

These varying approaches, and especially the proscribing effect given *Catco* by the court below, presage a vast and continuing impact upon the great number of certificate

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[10] In addition to the Fifth Circuit's opinions in Nos. 18112 and 18113, above, and the decision of the court below, the others are: *United Gas Improvement Co.* v. *F. P. C.*, 9th Cir., No. 16692 (October 31, 1960) and *United Gas Improvement Co.* v. *F. P. C.*, 10th Cir., No. 6280 (January 23, 1961). All of these opinions, including Judge Brown's dissenting opinion in the Fifth Circuit cases, are reproduced as Appendices B (decision below), C (Ninth Circuit), D (Tenth Circuit), and E (two cases, Fifth Circuit), *infra*, pp. 28, 35, 49, 56.

[11] The Ninth and Tenth Circuits do not put the same "tenor" to *Catco* as do the court below and the Fifth Circuit. The Ninth Circuit reasons that prices approved in hearings in which intervention had been denied may be used in fixing a price line because such prices must be taken as correct. Not so the court below and the Fifth Circuit. They appear to compel a "just and reasonable" rate hearing. The Tenth Circuit, on the other hand, holds that "[a]t least until some final disposition of the CATCO and *Transco-Seaboard* applications, *all of the prices submitted must be regarded as suspect*" (*infra*, p. 53). The Tenth Circuit also condemns as "suspect" the initial price level announced for southern Louisiana in the first Amendment to the Commission's *Statement of General Policy No. 61-1* (18 C. F. R. §2.56) in which 21.5¢ per Mcf, exclusive of tax reimbursement, is announced as the initial price level for southern Louisiana; whereas, in this Court's opinion of January 23, 1961 in *Federal Power Commission, et al.* v. *Transcontinental Gas Pipe Line Corp.*, Nos. 45 and 46, October Term, 1960, it was observed that the Commission's action in certificate matters must be viewed with this Policy Statement "in mind" (Slip Opn. p. 21, fn. 18).

proceedings which are destined to come before the Commission, thus making it of the utmost importance and urgency that the judgment of the court below be reviewed by this Court.[12] In the absence of an authoritative clarification—which only this Court can give—the Commission's authority in the vast number of producer certificate proceedings pending and to come before it will be in a state of such utter confusion and subject to such delays and uncertainties that serious harm can but result to the gas consuming public and all segments of the natural gas industry. A matter of such general importance and vital public concern is entitled to settlement by this Court.

2. The Court of Appeals has misconstrued and misapplied the decision of this Court in *Catco* and has decided a federal question in a way in conflict with an applicable decision of this Court.

The decision below is based squarely on the Court of Appeals' understanding of *Catco*, *infra*, p. 29. We believe the court below misconceived *Catco's* rationale (as well as the effect of *Transco-Seaboard*, 361 U. S. 195, *supra*, p. 9, fn. 7), and overreached itself in allowing the Commission, as a practical matter, no leeway or discretion in fixing a "line" for initial prices in southern Louisiana, thus encasing the administrative process in an impossibly severe jacket in a most active phase of the administration of the Natural Gas Act.

In certificating the proposed prices, the Commission gauged their alignment by two separate and distinct criteria. One, prices certificated after June 24, 1957 (the date the Commission issued certificates in the CATCO proceeding (17 F. P. C. 880)). The other, prices certificated prior to that date.[13] The Commission did not find the

[12] See Judge Brown's dissent in the Fifth Circuit cases for a practical and realistic appraisal of the impact of decisions such as that of the court below, as well as the legal fallacy of the "tenor" which the court below would attribute to *Catco*. *Infra*, pp. 70-85.

[13] Before the Commission and the court below, respondent contended that the proposed prices were "out of line" because the Commission could not look to prices certificated after June 24, 1957

prices to be "just and reasonable", it found them to be in "the public convenience and necessity". The Court of Appeals—though the record before it clearly shows that a substantial number of the post-June 24, 1957 certificates are permanent and final at prices equal to and above those proposed here—assumed that the instant prices were "*inflated*" (*infra*, pp. 31, 32), and could not be justified on the basis of other prices "which may be equally inflated" (*infra*, p. 31).

Catco expressly does not require proof of "just and reasonable" rate in a §7 proceeding (360 U. S. at 390-391). On the record in this case and the Commission's specific and fully supported findings thereon, the court below, we submit, could not have set aside the Commission's order unless it felt that proof of justness and reasonableness of the initial price was a prerequisite to unconditional certification. And that appears to be precisely what prompted the Court of Appeals to set aside the order.

The Court of Appeals construes *Catco's* "tenor" to require a producer applicant to prove that his proposed price is "*the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest*" (*infra*, p. 32). This goes to the core of the court's conclu-

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(date of Commission Order in CATCO proceeding) as all of such prices were rendered meaningless by this Court's decision in *Catco*. (Br. for Pet. in court below, pp. 27-30). In other words, respondent has contended throughout that *Catco* imposed a retroactive freeze on *all* southern Louisiana prices to some pre-June 24, 1957 level, no matter the circumstances attending the issuance of certificates by the Commission, no matter the fact that a very substantial number of those certificates are firm and final, and no matter the circumstances of this particular case. Respondent assumed (erroneously as will be shown if this petition is granted) that the Commission's CATCO certificate order of June 24, 1957 was *sine qua non* to every subsequent certificate issued by the Commission authorizing the sale of gas from southern Louisiana. The Commission, of course, disagreed with this. But it went further. The Commission specifically found that when due regard is given to relevant factors the instant prices are not "out of line" with pre-CATCO (i. e., pre-June 24, 1957) prices (R. 103-105). The court below does not even mention this ground which was a separate and distinct basis for the Commission's order.

sion that it could find "*nothing*" in the record to justify that the Commission had performed its duty under *Catco*. In so construing *Catco* the opinion of the court below, if permitted to stand, sets the stage for the conversion of every producer certificate proceeding into a full-blown "just and reasonable" rate proceeding which is not alone counter to *Catco* and the Act but will result in complete breakdown of the administration of the Act. Such a situation cannot possibly be good for the gas consuming public (especially those relying on out-of-state gas)[14] nor for any segment of the natural gas industry.

We submit there cannot be an ascertainment of "*lowest possible reasonable rate*" without a "just and reasonable" rate determination which this Court in *Catco* specifically said "* * * *the Act does not require* * * * *in a §7 proceeding as it does in one under either §4 or §5.* Nor do we hold that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates." 360 U. S. at 390-391.[15]

In the context in which this Court in *Catco* referred to the "lowest possible reasonable rate" language in original §7(c) of the Act (360 U. S. at 388 and footnote 7) we do not believe it was intended thereby to make "lowest possible reasonable rate" the test in certificate proceedings. Had that been so, the Court could have set aside the Commis-

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[14] For the year 1959 about 40% of total U. S. marketed natural gas remained in the State where produced. *Bureau of Mines Minerals Yearbook*, 1959, Natural Gas, p. 8; also, in its opinion in the *Phillips* rate case issued September 28, 1960 the Commission said: "* * * almost half the markets for gas in this country are not under our jurisdiction."

[15] If "lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest" does not mean a rate just shy of confiscation (which would entail full cost-of-service) but rather means the lowest rate at which the gas was available to the interstate market in order to assure maintenance of adequate service by Hope to its customers, then this record clearly meets that test. The record positively establishes that Hope has a critical need for the gas and that after prolonged negotiations and some 18 meetings with producers it could not purchase the gas at a lower price (R. 45-46). The court below recognizes this. *Infra*, p. 3, fn. 4.

sion's CATCO order in a few words. Nor, if that was *Catco's* "tenor", can we visualize how the Court could have specified as it did that a "just and reasonable" rate determination is not prerequisite to the issuance of producer certificates.

We believe the court below went entirely too far in its interpretation of *Catco*. The probable effect of the decision below will be to force every producer who seeks a certificate and who is called to a hearing on his application, to put on a full-scale utility-type cost-of-service rate case in order to show that his proposed initial price is "the lowest possible reasonable rate", thus forcing every certificate hearing to assume all of the complexities of a §4(e) or §5(a) rate adjudication. The Fifth Circuit's view of the decision below enhances this fear, *infra*, p. 28. *Catco* itself, as well as the exigencies of the interstate gas markets, the practicalities of the situation, the administrative burden, and the "public convenience and necessity" standard of §7(e) of the Act, cry out against the legal propriety and practical effect of such a standard in certificate proceedings.

Actually, the "tenor" of *Catco*, as found by the court below, will inject into future producer proceedings the same "nigh interminable" delays which this Court found in *Catco* to be incidental to producer §5 proceedings (360 U. S. at 389), and which in turn appears to have been one of this Court's reasons for specifying that the Commission must give "a most careful scrutiny and responsible reaction to initial price proposals of producers under §7", (*id*, at 391). Yet *Catco* recognizes that "rates are [not] the only factor bearing on the public convenience and necessity, for §7(e) requires the Commission to evaluate all factors bearing on the public interest" (*id.*).

The focal inquiry in this case involves the true "tenor" of *Catco*. That inquiry can be answered finally only by this Court. We believe the Court of Appeals misconstrued and misapplied the doctrine of that case and that its decision will have serious adverse consequences on the natural gas industry and all whose interest lies in adequacy of gas

supply. The question is one of utmost and pressing public concern and is highly important in the natural gas industry and in the administration of the Natural Gas Act. It should be authoritatively resolved by this Court as soon as possible.

3. The Commission's establishment of a standard in implementation of its duty under *Catco* by which to judge these and other producer prices in certificate proceedings was a reasonable exercise of administrative judgment and should not have been set aside by the Court of Appeals. The propriety of the action of the court below presents a question of general importance not only in the administration of the Natural Gas Act but also in the general field of judicial review of administrative action.

In the light of *Catco*, the Commission announced the following standard to determine whether proposed initial prices of producers are "out of line" (R. 105):

> "We shall consider any new application based upon a price in excess of any price we have heretofore certificated to be 'out of line' and shall require conclusive proof from the applicant that the public convenience and necessity requires certification at that price."

The standard was applied by the Commisson in two separate and distinct respects to judge the instant prices. They were found "in line" and unconditioned certificates were issued. Simultaneously the Commission applied the same standard to the producers' initial prices in the *Transwestern* proceeding, *supra*, p. 11, fn. 9. They were found not to comply with the standard and were conditioned.

Since announcing the rule in this proceeding on August 10, 1959 (and in addition to *Transwestern*), the Commission has frequently imposed price reducing conditions in permanent certificates issued to producers where the proposed price was found "out of line" when tested by the foregoing standard. See, *e.g.*, *Phillips Petroleum Co.*, 22 F. P. C. 694, modification denied, 22 F. P. C. 1021; *El Paso Natural Gas Co.*, 23 F. P. C. 369, rehearing denied, 23 F. P. C. 610; *Gulf Oil Co.*, 23 F. P. C. 664; *Peoples Gulf Coast Natural Gas*

Pipeline Co., 24 F. P. C. 1, amended, 24 F. P. C. 106; *Humble Oil and Refining Co.*, order issued August 9, 1960, in Nos. G-13679, *et al.* (not yet reported); *Natural Gas Pipeline Co.*, order issued August 12, 1960, in Nos. G-12399, *et al.* (not yet reported).

The Commission has thus, by use of the standard, fully implemented *Catco* and is carefully scrutinizing producers' initial prices and is holding the line. Yet the Court of Appeals struck down the Commission's standard because it was "reluctant to endorse so *dubious* a standard", *infra*, p. 30. We submit that the standard which the Commission adopted was a reasonable exercise of administrative discretion and should not have been rejected because the court may have viewed it as "dubious", especially where, as here, a substantial number of post-CATCO certificate prices are final.[15] Numerous factors inherent in the Commission's accumulated experience and insight in matters pertaining to an appropriate standard by which to judge alignment of initial prices went into formulation of the standard. Factors such as those demonstrated by the record in this case where *gas from the very same field* (Bayou Pigeon) has heretofore been permanently certificated at a base price of 21.5¢ per Mcf plus 2.175¢ per Mcf tax reimbursement (a total price in excess of any of the prices here involved); and the order so certificating that sale is firm and final, entered into the Commission's conclusion (R. 101; fn. 3).

The adverse impact upon gas supply to the interstate market is also a vital factor to which account must be given in setting a standard by which to make price comparisons in search of alignment in a given area. The repercussions which are bound to follow from not viewing alignment of prices in light of those previously permanently certificated

[15] Additionally, the Court of Appeals ignored the fact, clearly evidenced in the Commission's order, that the instant prices are not out of line with pre-CATCO prices (i.e., 1953, 1954 and 1955 prices —R. 104-105). The court does not even mention this latter and separate basis upon which the Commission found that the prices were not "out of line".

in the area and the impact of disparate treatment of those with like contractual rights upon the incentive to search for, produce and commit gas to the interstate market are factors as to which the administrative awareness should not be lightly cast aside.[16]

Catco's instruction to the Commission to "hold the line" necessarily empowered the Commission to establish a principle by which to fix the line. This the Commission did in a reasonable exercise of its judgment. Consistent adherence to the principle in contemporaneous and later orders imposing price-reducing conditions in a substantial number of producer certificates attests to the effectiveness of the standard. It should not be struck down only in those instances where its application results in the non-attachment of a price condition. But that would be the result of the Court of Appeals' view. If the Commission cannot use previously certificated prices (even those accepted in 1953 and approved in 1954 and 1955), nor, even those certificated after the CATCO order and which are final and effective, then the standard is destroyed, and the destruction flows from the assumption of the court below that this Court's decision in *Catco* wiped out all intervening Commission action and even retroactively upset, for price comparison purposes, initial prices accepted and approved in 1953, 1954 and 1955.

Such a result, we believe, leaves the Commission without a means whereby to establish a line for prices in southern Louisiana, and thus, in effect, prevents the Commission from issuing unconditioned certificates for southern Louisiana gas until possibly some time in the far distant

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[16] The Commission concluded (R. 105-106): "* * * considering the need of Hope for this gas, the fact that it has been unsuccessful in locating gas for its customers in its own exploration activities in south Louisiana and has been unable to purchase any at a lesser price than it is here paying, that the prices will be relatively firm for at least 8, and sometimes for 12 years, that none of its customers have raised any question as to the producer prices and the fact that every other aspect of the public convenience and necessity has been met, we conclude that the public convenience and necessity requires the issuance of the producer applications at the proposed prices. *To deny these supplies to Hope would be a disservice to all of the consumers dependent upon it for their gas.*"

future, because if the Commission cannot fix the line it is impossible for it to determine whether or not a proposed price is "out of line".

Particularly in the circumstances of this case in which the evidence clearly establishes and the Commission found that certification of the instant prices would have no disruptive or status quo disturbing effect either at the field end or the consumer end of the project, we submit that the standard which the Commission announced and applied was a reasonable one which the court below should not have set aside.[17]

In *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947) this Court said (332 U. S. 207-208):

> "The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. The wisdom of the principle adopted is none of our concern. • • •
>
> "We are unable to say in this case that the Commission erred in reaching the result it did. The facts being undisputed, we are free to disturb the Commission's conclusion only if it lacks any rational and statutory foundation. • • •"

In *Colorado Interstate Gas Co.* v. *F. P. C.*, 324 U. S. 581, 589-590 (1945), the Court said:

> "When Congress, as here, fails to provide a formula for the Commission to follow, courts are not warranted in rejecting the one which the Commission employs unless it plainly contravenes the statutory scheme of regulation. • • • [T]he appropriateness of the formula • • • raises questions of fact, not of law."

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[17] See, e.g., *Gray* v. *Powell*, 314 U. S. 402 (1941); *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111 (1944); *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947); *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143 (1946); *F. C. C.* v. *Allentown Broadcasting Co.*, 349 U. S. 358 (1955); *Railroad Comm. of Texas* v. *Rowan & Nichols*, 310 U. S. 573 (1940), Opinion amend, 311 U. S. 614 (1941); *Far East Conference* v. *United States*, 342 U. S. 570, 574 (1952); *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U. S. 344 (1953); *R. C. A.* v. *United States*, 341 U. S. 412 (1951).

4. The Commission's order was supported by substantial evidence. The Court of Appeals erred in concluding otherwise and in disregarding the separate basis of the Commission's conclusion that the proposed prices were not "out of line" with 1953, 1954 and 1955 prices.

The record in this case is vitally different from that in *Catco*, yet the court below would equate the two. The court states that "[a]lthough the order now before us was handed down a month after . . . *Catco, the evidence was taken before the court's opinion was rendered, and thus before it had become known that additional explanatory proof would be required to support inflated prices* (*infra*, pp. 31-32). The court was in error in assuming that the evidence was taken before *Catco* (*supra*, p. 8; also R. 91). We are unable to state to what extent this material misapprehension influenced the decision below. In the context in which it appears it seems to have influenced the court's conclusion that the order was not supported by substantial evidence because the court seems to feel that the producer applicants were not aware of *Catco* until after the hearing concluded and hence, were not aware of the type of evidence required to support unconditioned certificates. But that simply is not the fact. At any rate, it is significant that the court went from that false premise to observe that "[t]he bulk of the evidence was simply to the effect that the contracts were negotiated at arm's-length, and that the sales would not have been made at any lower price (*infra*, p. 32, fn. 4).

The attempt to place this case on an equal fact footing with *Catco* is at odds with the record. As heretofore shown, *supra*, pp. 5-7, this record establishes critical need by Hope, alignment of the prices, no triggering, no new price plateau, no increase to Hope or its customers (in fact Hope gets this gas at *less* than its cost for existing supplies at the point of delivery to its customers), no additional facilities by Hope, no adverse impact either in the field or the consumer end of the project, and the other favorable features to Hope and its customers heretofore enumerated, *supra*, pp. 5-7.

Despite the foregoing, the Court of Appeals holds that while the Commission "purports to have made a determination" in the light of *Catco*, "the decision of the Commission is unsupported by substantial evidence in the record, and cannot stand" (*infra*, p. 32). The decision of the court below in this respect is so at odds with the record evidence that it can stand only if producer certificate proceedings must take on the burden of full-fledged "just and reasonable" rate proceedings.

The nature of the price conditioning indicia announced in *Catco* make price comparisons and status quo disruptive effects of proposed prices the core of proof in a certificate proceeding. Thus the evidence here established that these proposed sales not only did not signal the existence of a situation, which might not be in the public interest, it went further and negated the existence of each one of the possible status quo disturbing factors announced in *Catco* (out of line, triggering of general price rises and increase in the applicant's existing rates by reason of "favored nation" clauses or otherwise—360 U. S. 391). The evidence clearly established the proposals as being in the public interest.

That producer base prices of 20¢ per Mcf in south Louisiana were approved in 1953, 1954 and 1955 is a fact and a matter of public record (R. 104). That there are a substantial number of permanently certificated final prices in south Louisiana is also a fact and a matter of public record. Even should this Court agree with the Court of Appeals that prices under court or Commission review are "suspect" and cannot be used to establish a price line, and go further and agree with the court below that, in such circumstances, like prices in the same area though not under review ought also to be regarded as "suspect" and cannot be considered in fixing a line "except upon evidence and findings to the effect that they are not subject to the same infirmities which are under test in the pending proceedings" (*infra*, p. 31, fn. 3), there can still be no reasonable basis for rejecting the use of pre-CATCO prices, properly

trended, in the establishment of the price line.[18] At any rate, the selection of such a gauge by the Commission was not an abuse of discretion. And we further suggest there is no basis at all for claiming that the announcement by the Commission of what prices it accepted or approved in south Louisiana in 1953, 1954 and 1955 constitutes a decision which is not supported by substantial evidence. It was perhaps for that reason that the decision below does not even refer to that aspect of the Commission's order.

Recently this Court in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, and *National Coal Ass'n* v. *Transcontinental Gas Pipe Line Corp., supra,* quoted approvingly from *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U. S. 236, 241, as follows (slip opn. pp. 5-6):

> " 'The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60. Its function is not only to appraise the facts and to draw inferences from them

[18] We submit that *Catco* did not outlaw for price comparison purposes prices certificated after the Commission's order in the CATCO proceeding on June 24, 1957, particularly those which are final and not subject to court or Commission review. To conclude otherwise will presage an era of confusion and uncertainty in an area of widespread public concern and lead to many inequities. Moreover, there is no way in which previously issued certificate orders approving prices at and above the instant prices, and which orders are final, can be reopened to determine what, if any, infirmities might inhere in them. Those orders issued on the basis of the record then before the Commission and were not based on the Commission's order in CATCO.

Additional to the practical difficulties and legal problem which such result will raise, it proceeds on the premise that *Catco* and *Transco-Seaboard* precluded the Commission from ever approving the prices involved there, no matter the evidentiary showing on remand. But *Catco* merely held the evidence there not to be sufficient. *Transco-Seaboard* merely remanded for "reconsideration and redetermination" in the light of *Catco*. Therefore, since the *Catco* prices were not outlawed, there is no basis for discarding all post-CATCO certificated prices.

but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. . . .' See *Interstate Commerce Comm'n* v. *Railway Labor Executives Assn.*, 315 U. S. 373, 376-377."

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

OLIVER L. STONE, Esquire,
Attorney for Shell Oil Company.

Of Counsel,
WILLIAM F. KENNEY, Esquire,
JOSEPH C. SPALDING, Esquire.

WILLIAM G. LOVE, Esquire
DONALD J. MULVIHILL, Esquire
EUGENE F. SIKOROVSKY, Esquire
Attorneys for J. Ray McDermott & Co. Inc.

JOHN A. O'CONNOR, Esquire
H. Y. ROWE, Esquire
Attorneys for Ocean Drilling & Exploration Co.

ROBERT J. STANTON, Esquire
JOSEPH W. MORRIS, Esquire
KENNETH SCOTT, Esquire
ROBERT E. MAY, Esquire
Attorneys for Amerada Petroleum Corp.

ROBERT W. HENDERSON, Esquire
THOMAS G. CROUCH, Esquire
ROBERT E. MAY, Esquire
Attorneys for Caroline Hunt Sands and Loyd B. Sands

CECIL N. COOK, Esquire
NEAL POWERS, JR., Esquire
Attorneys for Beck Oil Company, *et al.*

THOMAS F. RYAN, JR., Esquire
Attorney for Texas Gas Exploration Corporation

ROBERT E. MAY, Esquire
Attorney for Callery Properties, Inc.

WILLIAM J. MERRILL, Esquire
WILLIAM H. HOLLOWAY, Esquire
GEORGE H. LAWRENCE, Esquire
Attorneys for Humble Oil & Refining Co.

JACK T. CONN, Esquire
WM. AMORY UNDERHILL, Esquire
Attorneys for Kerr-McGee Oil Industries, Inc.

ROSS MADOLE, Esquire
WILLIAM S. RICHARDSON, Esquire
ROY L. MERRILL, Esquire
WILLIAM P. MCCLURE, Esquire
Attorneys for Socony Mobil Oil Company, Inc.

GEORGE D. HORNING, JR., Esquire
Attorney for Union Oil Company of California

ROBERT O. KOCH, Esquire
CLYDE E. WILLBERN, Esquire
Attorneys for Tidewater Oil Company

L. A. THOMPSON, Esquire
W. W. HEARD, Esquire
J. P. HAMMOND, Esquire
C. O. STONE, JR., Esquire
WILLIAM J. GROVE, Esquire
Attorneys for Pan American Petroleum Corp.

J. EVANS ATTWELL, Esquire
Attorney for Kilroy Properties, Inc., *et al.*, Bel Oil Corporation, and Richardson & Bass (Louisiana Account)

RAYBURN L. FOSTER, Esquire
WM. J. ZEMAN, Esquire
H. K. HUDSON, Esquire
KENNETH HEADY, Esquire
JAMES G. WILLIAMS, Esquire
CHARLES E. MCGEE, Esquire
Attorneys for Phillips Petroleum Company

LLOYD F. THANHOUSER, Esquire
BRUCE R. MERRILL, Esquire
ROBERT C. HAWLEY, Esquire
Attorneys for Continental Oil Company

LUCIUS M. LAMAR, Esquire
WOOLLEN H. WALSHE, Esquire
JUSTIN R. WOLF, Esquire
Attorneys for The California Company

CLEON L. BURT, Esquire
W. RUSSELL GORMAN, Esquire
Attorneys for Mississippi River Fuel Corporation

March, 1961

Appendix A.

Pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, as amended by Act Feb. 7, 1942, c. 49, 56 Stat. 83, 15 U. S. C. 717-717w:

SECTION 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: * * * [56 Stat. 83; 15 U. S. C. §717f (c)].

* * * * * * *

SECTION 7(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 83; 15 U. S. C. §717f (e)].

Appendix B.

Opinion and Judgment of U. S. Court of Appeals, District of Columbia Circuit.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 15,461.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

TEXAS GAS EXPLORATION CORPORATION, *et al.*,
KILROY PROPERTIES, INC., *et al.*,
BEL OIL CORPORATION,
RICHARDSON & BASS (LOUISIANA ACCOUNT), OPERATOR,
TEXAS EASTERN TRANSMISSION CORPORATION,
HOPE NATURAL GAS COMPANY,
TEXAS GAS TRANSMISSION CORPORATION,
THE CALIFORNIA COMPANY,
MISSISSIPPI RIVER FUEL CORPORATION,

Intervenors.

ON PETITION TO REVIEW ORDER OF THE FEDERAL POWER COMMISSION.

Decided December 8, 1960.

Before FAHY, WASHINGTON and DANAHER, Circuit Judges.

WASHINGTON, *Circuit Judge:* This case arises upon a petition to review an order of the Federal Power Commission granting unconditional certificates to certain producers of natural gas to make new sales at initial prices in excess of 23 cents per Mcf, upon the authority of Section 7 of the Natural Gas Act, 52 STAT. 824 (1938), as amended, 15 U. S. C. § 717f (1958). The primary question before us is whether the action of the Commission in this case is consistent with the principles announced in *Atlantic Refining Co.* v. *Public Service Commission*, 360 U. S. 378 (1959), commonly called the "Cateo" case. There, the Commission granted a Section 7 certification, without price condition, of producer sales in the same general area (Southern Louisiana) at an initial rate of 22.4 cents per Mcf.[1] The Supreme Court overturned the certification and remanded the matter to the Commission for further proceedings.

In the *Cateo* decision, the Supreme Court emphasized the crucial character of the initial certificating of a proposal under Section 7(e) of the Natural Gas Act. The inordinate delays, without protection of refund, which are the incidents of a Section 5 proceeding to reduce unreasonable initial prices, provide "a windfall for the natural gas company with a consequent squall for the consumers." *Id.* at 390. The Commission must, therefore, give "a most careful scrutiny and responsible reaction to initial price proposals of producers under §7." *Id.* at 391. The Act does not require a determination that proposed initial rates are "just and reasonable" in the sense of Sections 4 and 5, but "[w]here the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise," the Com-

[1] This rate included a state tax of 1 cent per Mcf. See 360 U. S. at 381. The rate of over 23 cents involved in the present case includes reimbursement of Louisiana severance taxes at the rate of 2.05 cents per Mcf.

mission may exercise its discretion so to condition the certificate "that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act." *Id.* at 391, 392. If the Commission declines to exercise this discretionary power, and "unconditional certificates are issued where the rate is not clearly shown to be required by the public convenience and necessity . . . full protection of the public interest is not afforded." *Id.* at 392. Applying these principles to the case before it, the Supreme Court held that there was "insufficient evidence [before the Federal Power Commission] to support a finding of public convenience and necessity prerequisite to the issuance of the permanent [unconditional] certificates." *Id.* at 392.

We read the *Catco* decision as posing for the Commission two alternative courses in cases where a natural gas company seeks certification of sales at prices which are suspiciously higher than other or former prices in the area, or which in some other way will tend to have an inflationary impact upon the natural gas market. As one solution, "the Commission in the exercise of its discretion might attach such conditions as it believes necessary" to protect the public interest while other rate testing procedures are in process. *Id.* at 391. On the other hand, it may grant unconditional certification upon evidence sufficient "to support a finding of public convenience and necessity." *Id.* at 392.

The Commission urges that the initial rates approved in the proceeding presently before us do not fall within the scope of the *Catco* rule because they are in keeping with numerous other certified sales in the area.[2] We are, however, reluctant to endorse so dubious a standard of reference, since presumably the high price certifications

[2] We find nothing in the present record to indicate that the area involved in *Catco*—the off-shore fields adjacent to the coast of Southern Louisiana—can be meaningfully distinguished from the land area fields in Southern Louisiana here involved.

which followed in the wake of the Commission's *Catco* certification are as much subject to explanation as the *Catco* price itself. Where the inquiry is whether a particular proposed price is inflated, it serves no purpose to refer to other prices which may be equally inflated.[3] We believe that the initial price proposals here at issue fall within the *Catco* rule, and hence cannot be unconditionally certificated by the Commission without the supporting evidence which that case requires.

The Supreme Court noted, in the *Catco* case, that the record before it supplied "little more information than was contained in the printed contracts." *Id.* at 392. It does not appear to us that the record presently under review is materially better than that found to be deficient in *Catco*. Although the order now before us was handed down a month after the Supreme Court had spoken in *Catco*, the evidence was taken before the court's opinion was rendered, and thus

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[3] We entirely agree with the following statement by the Ninth Circuit in a recently decided case similar to the one at bar:

"When an order certificating an initial rate is under court or Commission review, it is possible that the certificate may be eventually denied or price conditions may be attached. In our opinion an existing rate subject to such a hazard does not provide a reasonably reliable basis upon which to predicate a price line. In the event the existing rate is later modified or conditioned as a result of the pending proceedings the foundation of the line derived therefrom would be undermined. Moreover, the acceptance of questioned existing prices as a guide in setting the line might itself have the anomalous effect of creating a standard by which the questioned rates would then be judged.

"For the reasons indicated we are of the opinion that it would be an abuse of discretion for the Commission in establishing a price line to rely upon producer prices which are under such a cloud.

"We go further and express the view that where a substantial number of certificated prices are thus under court or Commission review, like prices in the same area though not currently under review ought to be regarded as suspect. In such circumstances it would seem that such similar prices ought not to be relied upon in fixing a line except upon evidence and findings to the effect that they are not subject to the same infirmities which are under test in the pending proceedings." United Gas Improvement Co. *v.* Federal Power Commission, 9th Cir., No. 16,692, decided Oct. 31, 1960, slip. op. at 9-10.

before it had become known that additional explanatory proof would be required to support inflated prices. The Federal Power Commission, in its opinion in the present case, took the position that the general evidence received was sufficient justification because the certified prices were not "out of line."[4] Doubtless it was encouraged in this by the Third Circuit's affirmance of certifications at comparable prices in the *Transco-Seaboard* case, decided just before the Commission's opinion in this case was released.[5] Thereafter, however, *Transco-Seaboard* was reversed by the Supreme Court to permit the Federal Power Commission to determine for itself whether the standards set forth in *Catco* had been satisfied. *Public Service Commission of New York* v. *Federal Power Commission*, 361 U. S. 195 (1959). In the case before us, the Commission purports to have made a determination of that sort. In our view, however, the decision of the Commission is unsupported by substantial evidence in the record, and cannot stand.

The *Catco* decision does not prescribe the standard of proof which must be satisfied to support an unconditional certification. Its tenor, however, is unambiguous: the opinion expressly reaffirms that it was "the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." *Atlantic Refining Co.* v. *Public Service Commission*, *supra* at 388. We believe that the Supreme Court meant to impress upon the Commission an interpretation of the "public interest" which, in the context of a rising natural gas market, demands a real administrative effort to hold back prices. We find

[4] The bulk of the evidence was simply to the effect that the contracts were negotiated at arms length, and that the sale would not have been made at any lower price. This is not enough to satisfy the requirements of *Catco*. See Public Service Commission of New York v. Federal Power Commission, No. 15 412, decided this day.

[5] United Gas Improvement Co. v. Federal Power Commission, 269 F. 2d 865 (3rd Cir. 1959).

nothing in the record before us which would justify the conclusion that the Commission has adequately performed this duty. The order, insofar as it grants unconditional certification to the initial price proposals of the producer applicants, is reversed and the case is remanded to the Commission for further proceedings in which the producer applicants may, if they so choose, either augment the record so as to support a certification without price condition, or seek a certification appropriately conditioned.

So ordered.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

SEPTEMBER TERM, 1960.

No 15,461.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

TEXAS GAS EXPLORATION CORPORATION, *et al.*,
KILROY PROPERTIES, INC., *et al.*,
BEL OIL CORPORATION,
RICHARDSON & BASS (Louisiana Account) Operator,
TEXAS EASTERN TRANSMISSION CORPORATION,
HOPE NATURAL GAS COMPANY,
TEXAS GAS TRANSMISSION CORPORATION,
THE CALIFORNIA COMPANY,
MISSISSIPPI RIVER FUEL CORPORATION,
Intervenors.

ON PETITION TO REVIEW ORDER OF THE FEDERAL POWER COMMISSION.

Before: FAHY, WASHINGTON and DANAHER, Circuit Judges.

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this court that the order of the Federal Power Commission on review in this case is reversed insofar as it grants unconditional certification to the initial price proposals of the producer applicants, and that this case is remanded to the Federal Power Commission for further proceedings not inconsistent with the opinion of this court.

Per Circuit Judge WASHINGTON.

Dated: December 8, 1960.

Appendix C.

Opinion of U. S. Court of Appeals, Ninth Circuit.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,
vs.
FEDERAL POWER COMMISSION,
Respondent.

No. 16,692
Oct. 31, 1960

ON PETITION TO REVIEW ORDER OF THE FEDERAL POWER COMMISSION.

Before:

BARNES and HAMLEY, Circuit Judges, and FOLEY, District Judge.

HAMLEY, Circuit Judge:

Under review in this proceeding is a Federal Power Commission order granting certificates of public convenience and necessity enabling two producers of natural gas to sell their product to a natural gas pipeline company. The two producers are The Superior Oil Company (Superior) and The California Company (California), both of which are lessees of natural gas fields in Louisiana. The gas is to be sold to United Gas Pipe Line Company (United) which is engaged in purchasing natural gas and thereafter transporting and selling it in interstate commerce.

The petition to review was filed by The United Gas Improvement Company (UGI), operator of the municipally-

owned gas works of the City of Philadelphia. United, Superior, California, and the Public Service Commission of the State of New York (New York) have intervened in this court. The City of Philadelphia has filed an *amicus curiae* brief.

On July 21, 1958, California and United entered into a contract for the sale and purchase of natural gas produced under a lease held by California in the Bayou Penchant Field, Terrebonne Parish, Louisiana. On September 8, 1958, Superior entered into a similar contract with United relating to natural gas produced from certain leaseholds and interests in leaseholds held by Superior in the Bayou Penchant, Palmetto Bayou, and Four Isle Dome Fields, Terrebonne Parish, Louisiana. These gas purchase contracts considered together, are for the sale during a term of twenty years of an estimated total of 636 billion cubic feet of reserves. Each contract provides for an initial "base" price of 21.5 cents per Mcf plus 2.3 cents per Mcf tax reimbursement, or a total initial price of 23.8 cents per Mcf.[1]

By virtue of section 7(c) of the Natural Gas Act (Act), 15 U. S. C. A. §717f(c), it was necessary for Superior and California to obtain from the Commission certificates of public convenience and necessity authorizing them to sell this gas to United. Phillips Petroleum Co. *v.* Wisconsin, 347 U. S. 672. Both companies applied for such certificates. It was also necessary that United obtain such a certificate authorizing it to construct and operate certain lateral supply facilities required for receiving the gas to be purchased under these contracts.

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[1] In each contract the initial base price is [illegible]ern until March 1, 1963. The base price is then to be 23.5 cents per Mcf for the next four years, 25.5 cents for the next succeeding four-year period, 27.5 cents for the third four-year period, and 29.5 cents during the remaining period of the contract. The price specified for any of these subsequent periods is subject to redetermination according to a formula and procedures set out in the contracts. It is also provided that in the event taxes are imposed in excess of the rate of 2.3 cents per Mcf United will reimburse Superior and California for three fourths of the amount of such tax increase.

The three applications were consolidated for hearing and disposition by the Commission. The hearing was held and concluded on March 17, 1959, before a Commission hearing examiner. UGI and New York were intervenors in that proceeding. On April 16, 1959, the examiner issued his findings and conclusion along with his decision and order that the certificates be issued as applied for with no conditions attached. 22 F. P. C. 252, 256.

Exceptions to the examiner's decision were filed by UGI. These exceptions were considered and in substance denied by the Commission in a decision and order dated August 10, 1959, and it was ordered that the certificates be issued. 22 F. P. C. 252. UGI and New York filed separate petitions for rehearing. These petitions were denied by the Commission on October 7, 1959. This review proceeding was then instituted.

The quarrel which UGI and New York have with the Commission order is that it has the effect of establishing higher initial producer prices than they believe are warranted.

It is provided in section 7(e) of the Act that a certificate of the kind here in question shall be issued if among other things the proposed sale or construction "is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied." Under this provision the Commission is vested with control over the conditions under which gas may be initially dedicated to interstate use.

Among the conditions thus subject to control are those which relate to the initial price proposed to be charged and paid. This does not mean that before certificating such a sale the Commission must determine that the proposed initial price is just and reasonable. It does mean that there should be by the Commission a "most careful scrutiny and responsible reaction to initial price proposals of producers under [7]." Atlantic Refining Co. v. Public Service Commission (Cateo), 360 U. S. 378, 391.

The court in Cateo stated the circumstances under which a "responsible reaction" to an initial price proposal would preclude the granting of a permanent and unconditional

certificate. ". . . Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest," the court said, "a permanent certificate should not be issued." 360 U. S. at 391. Such a situation would exist, the court indicated, where the proposed price is not in keeping with the public interest

> ". . . because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise." *Id.*

In this event, the court stated, the Commission might in its discretion grant a certificate subject to "such conditions as it believes necessary." 360 U. S. at 391. It follows that ordinarily when the proposed initial price signals the existence of such a situation, a certificate should not be issued or if issued appropriate conditions should be attached.

We say "ordinarily" because in Texas Gas Transmission Corp., 22 F. P. C. 378, review pending, sub nom. Public Service Commission v. F. P. C., No. 15461 (CADC), the Commission properly refers to circumstances under which an unconditional and permanent certificate might be issued notwithstanding the fact that the proposed price is out of line. Said the Commission:

> ". . . We shall consider any new application based upon a price in excess of any price we have heretofore certificated to be 'out of line' and shall require conclusive proof from the applicant that the public convenience and necessity requires certification at that price."[2] Id. at 388.

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[2] It is apparently with reference to this principle that the Commission states in its brief:

> "Where a proposed price is 'in line' a certificate issues on a minimal showing; where, however, the price is 'out of line' the applicant must make an extensive demonstration in support of his rate, else he suffers a certificate denial or a price reduction."

In the case before us the certificates were ordered to be issued in permanent form and without price conditions. In the light of Cateo this was warranted in so far as prices are concerned only if the Commission found on substantial evidence (1) that the proposed initial rates were not "out of line" as the Supreme Court used those words, or that if "out of line" the public convenience and necessity of certifying at those rates had been established, and (2) that their approval would not result in a "triggering" of general price rises or an increase of the applicants' existing rates.

We turn first to the "out of line" factor. In its order of August 10, 1959, the Commission concluded that the proposed initial prices of Superior and California in this proceeding are not out of line.[3] Thus the Commission never reached the question of whether prices which were out of line were nevertheless consonant with the public convenience and necessity.

UGI and New York challenges the Commission's ruling on two grounds: (1) The Commission misconceived what the court in Cateo meant by the "line"; (2) assuming that the Commission properly construed that term, the record does not support the finding that the initial prices here proposed hold the line.

UGI and New York advance several reasons why in their opinion the criteria applied by the Commission evidence a misconception of what the court in Cateo meant by the "line." One such reason is that the Commission predicated the price line upon comparative prices paid by pipeline

[3] What the Commission said was: "Considering whether the price is out of line under Cateo, the facts support the conclusion that Sun's price is not out of line. . . ." The reference to "Sun's" price is an apparent inadvertence, the intended reference being to Superior's and California's prices. An order involving the same issue, in which Sun Oil Company was the applicant, was entered on the same day. Sun Oil Company, 22 F. P. C. 351.

The hearing examiner had made no finding as to whether Superior's or California's proposed prices were out of line. The reason for this is that the decision in Cateo, which first discussed that consideration, was not handed down until after the hearing examiner had issued his decision.

companies in the area rather than upon prices paid by the applicant pipeline company.

That this was the principal criterion employed, with some special consideration of tax reimbursement provisions and the competitive situation, is indicated by this statement contained in the Commission order under review:

> "Considering whether the price is out of line under Cateo, the facts support the conclusion that Sun's price is not out of line on a comparative basis. Much south Louisiana gas is today being sold at 21.5 cents per Mcf plus tax reimbursement. Numerous other pipeline companies compete in this general area, and a number of 21.5-cent contracts have been executed. Although the price proposed by The California Company and Superior in this case involves greater tax reimbursement than some other 21.5-cent sales, in our opinion this greater tax reimbursement is justified by the factors present, including the size of these reserves, their accessibility to United's Pipeline, and the need of United to offer some additional price incentive in order to secure the volumes of gas in question.
>
> "The facts disclose that there were several prospective purchasers for this gas in addition to United, and that several offers were made to both The California Company and Superior for this gas. At least one such offer was at the same price United offered, but The California Company accepted United's offer, primarily because it preferred the 'take' provisions of United's contract. Superior preferred the United offer because there would be less delay in making deliveries." 22 F. P. C. 252, 254-55.

In Cateo the proposals concerned a portion of the outer continental shelf where the applicant pipeline company, Tennessee Gas Transmission Company (Tennessee), had no other contracts. Likewise, except for some contracts involving smaller reserves and smaller future potentials,

no other pipeline company held any contracts in that area. In the absence of any comparative prices in the outer continental shelf area[4] the court in Catco took notice of prices paid by Tennessee in another offshore area, the weighted average cost of gas to Tennessee in all areas, and prices paid by Tennessee in southern Louisiana. These other prices were substantially below the proposed initial rate in Catco, and the court found nothing in the record to justify the increase. It was therefore held that there was insufficient evidence to support a finding of public convenience and necessity prerequisite to the issuance of a permanent certificate.

The public has an interest in both obtaining reasonable rates and the expeditious dedication of needed new gas reserves. The first such interest is accentuated when as here producer prices have been advancing from plateau to plateau without regulatory supervision. The second such interest would be adversely affected by the lengthy delays occasioned if disposition of certificate applications must await formal adjudication of proposed initial rates.

The "hold the line" technique spelled out in Catco is a stopgap device designed to meet the need created by this combination of circumstances in a manner as simple, direct and effective as possible. Its function is to afford standby protection to the public pending normal rate adjudicatory proceedings while enabling the Commission to act upon certificate applications with reasonable dispatch.

Considered in this light, the "line" referred to in Catco may properly be referenced to relevant existing producer prices under which substantial amounts of natural gas move in interstate commerce. Where some or all of the relevant producer prices are those paid by other pipeline companies it is especially important that they be consulted for comparative purposes. Otherwise an applicant pipeline company would be bound to a line established by its

[4] In our view the reference in Catco to the applicant pipeline company's other prices does not imply a ruling that under other circumstances prices paid by other pipeline companies in the same area may not be used for comparative purposes in setting a price line.

own past prices. In that event it would not be able to contract for new reserves in competition with pipeline companies whose existing prices would warrant a higher line. Where there are no relevant existing producer prices with which a price proposal may be compared, Catco indicates the best criterion of a proper price line may be the applicant's prices elsewhere, qualified where necessary by substantial evidence explaining price differentials.

Existing producer prices are relevant for comparative purposes only if they pertain to gas production in the same or an analogous area and if other principal features of the contracts are fairly comparable. Thus the contracts should be comparable from the standpoint of gas reserves and future potentials. The significance of any disparities existing as to these conditions should be explained by Commission findings based upon substantial evidence. Substantial variation in the quality of gas sold should be similarly treated. The Commission followed this course in Transwestern Pipeline Co. et al., 22 F. P. C. 391. Disparate provisions relative to facilities to be provided and other services to be rendered should be given effect as well in determining the propriety of the analogy to rate under other existing contracts.

In our view, however, a determination of relevancy for comparative purposes does not require examination into factors such as relative production costs which are not reflected in specific terms of the contracts. If this were required to implement the "hold the line" technique, the procedure would assume much of the complexity of a rate adjudication. This would tend to defeat the objective of providing simple, direct and effective stopgap protection for the consuming public. Where there are no producer prices which are otherwise comparable and resort must be had to other criteria, however, relative production costs, need, competition between pipeline companies, and no doubt other factors become significant.

From all that is said above it will also be understood that we find without merit the contention that the price line must necessarily accord with the pre-Catco line. We agree

with the view expressed by the Commission in Texas Gas Transmission Corporation et al., 22 F. P. C. 378, 388, that factors such as increased production costs since Catco, comparative accessibility of field locations, and comparative depth of sands tend to make pre-Catco prices irrelevant for comparative purposes in other cases.

UGI and New York further contend, however, that if the prices paid by other pipeline companies may be resorted to for comparative purposes, such comparison must at least be limited to prices which have been authorized only after the Commission's careful scrutiny according to Catco standards. It is argued that until it is demonstrated that such other prices have themselves been justified in certificate proceedings or tested in rate proceedings "they are absolutely meaningless as a touchstone."

The Commission points out that in utilizing price comparisons for the purpose of drawing a "line" the Commission has limited itself to a consideration of certificated prices. It nevertheless concedes that these certificated prices for the most part have never been subjected to Commission scrutiny. But, the Commission argues in effect, such a limitation is neither expressed nor implied in the Catco decision, and to impose such a limitation would render the whole technique impractical.

As previously indicated, the price line is intended to reflect current conditions in the industry. Therefore, comparative prices upon which it is based must be prices under which a substantial amount of natural gas presently moves in interstate commerce. The limitation urged by UGI could well defeat this objective by restricting the comparison to a small number of contracts under which little gas moves today. It could in fact, require a rollback to prices having no current relevancy.[5]

Assuming the criteria employed by the Commission to be otherwise acceptable, we hold that the consideration for

[5] The Commission points out that virtually none of the south Louisiana prices have been scrutinized in rate or certificate proceedings.

comparative purposes of producer prices not previously scrutinized does not evidence an abuse of discretion.

A third criticism which is leveled against the criteria employed in fixing a price line is that the Commission sanctions the use for comparative purposes of prices which are under review in pending court and Commission proceedings.

This objection is not raised as an abstract proposition. UGI contends that of the forty-seven producer price schedules upon which the Commission may have relied in fixing the line at 21.5 cents per Mcf (basic rate) in this case[6] four such schedules established in Trunk Line Gas Company et al., 22 F. P. C. 110, were and are under review in the Court of Appeals for the District of Columbia. Another thirty-one of these forty-seven schedules, UGI asserts, are presently under re-examination by the Commission in the Transco-Seaboard certificate case.[7]

When an order certificating an initial rate is under court or Commission review, it is possible that the certificate may be eventually denied or price conditions may be attached. In our opinion an existing rate subject to such a hazard does not provide a reasonably reliable basis upon which to predicate a price line. In the event the existing rate is later modified or conditioned as a result of the pending proceedings the foundation of the line derived therefrom would be undermined. Moreover, the acceptance of questioned existing prices as a guide in setting the line might itself

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[6] The Commission order and the record on which it is based do not reveal what producer price schedules were relied upon in fixing the line at 21.5 cents. In an appendix to the Commission's brief in this court there are listed forty-seven certificated schedules on file with the Commission prior to August 10, 1959, in which an initial price of 21.5 cents or more was specified. It is stated in the appendix that this list "is not exhaustive." It is not represented in the Commission's brief that these are the actual schedules relied upon by the Commission in its order of August 10, 1959.

[7] Public Service Commission of New York *v.* Federal Power Commission, et al., 361 U. S. 197, reversing 3 Cir., 269 F. 2d 865, with directions to remand to the Federal Power Commission "for reconsideration and redetermination in the light of Atlantic Refining Co. *v.* Public Service Commission of New York (Catco, 360 U. S. 378."

have the anomalous effect of creating a standard by which the questioned rates would then be judged.

For the reasons indicated we are of the opinion that it would be an abuse of discretion for the Commission in establishing a price line to rely upon producer prices which are under such a cloud.

We go further and express the view that where a substantial number of certificated prices are thus under court or Commission review, like prices in the same area though not currently under review ought to be regarded as suspect. In such circumstances it would seem that such similar prices ought not to be relied upon in fixing a line except upon evidence and findings to the effect that they are not subject to the same infirmities which are under test in the pending proceedings.

It is next contended that the technique used by the Commission sanctions the use for comparative purposes of prices scrutinized by the Commission in other proceedings in which a party to the current proceedings was denied the right to participate.

Here again the objection is not abstract, but is directed to circumstances existing in this case. Of the forty-seven producer price schedules referred to in footnote 6, UGI asserts that sixteen schedules were certified in four proceedings in which UGI and New York were denied the right to participate. Denial of the right to participate was apparently on the ground that UGI and New York were not interested in those proceedings. The proceedings involved producer sales of gas destined for resale in parts of the country where UGI has no facilities and New York has no jurisdiction.[8]

Where such a denial of the right to participate in prior proceedings has not been judicially challenged, the fact of

[8] See, for example, Trunkline Gas Company, et al., 22 F. P. C. 110, order issued on July 22, 1959, and opinion of Commissioner Connole dissenting therein. As previously noted, the order entered in this proceeding involving four of the rate schedules which are listed in the appendix to the Commission's brief is under review in the Court of Appeals for the District of Columbia.

denial should not preclude the Commission from referring to the initial price therein certified in the process of fixing a line in a subsequent proceeding.[8] This is true because if not judicially challenged a Commission order excluding participation by others must be taken as correct.

Where, however, denial of the right to intervene in the earlier proceedings is being questioned in the courts, the rate schedule certificated in that proceeding ought not to be so utilized. We have heretofore stated the reasons why prices established in an order subject to a pending court review ought not to be considered in fixing a price line.

Another objection advanced against the Commission's manner of proceeding is based on the fact that outstanding contracts deal in a variety of ways with the matter of tax reimbursement. Because of the variety of treatments it is contended, prices accepted for comparative purposes should include the tax reimbursement feature.

In determining that the initial prices proposed by Superior and California were not out of line the Commission considered only the base price of 21.5 cents per Mcf and did not include the 2.3 cents per Mcf tax-reimbursement feature. Considering only the base rate, the Commission was able to say that it was not out of line with the other basic rate schedules upon which it must have relied. Had it considered the total initial price, including tax reimbursement, however, the Commission could not have made that statement.[9]

The Commission correctly points out that the taxes paid by a producer represent out-of-pocket cost. Hence reimbursement for such taxes does not in and of itself repres at

[8] This is made clear in the hearing examiner's decision stating

> "Each contract provides for an initial 'base' price of 21.5¢ per Mcf plus 2.3¢ per Mcf tax reimbursement, or a total initial price of 23.8¢ per Mcf. This total price is 0.25¢ per Mcf higher than any at which a sale has been certificated by the Commission in South Louisiana. There are other sales which have been certificated at the same 'base' price; but no other involves a contract which calls for this 'base' price plus a tax reimbursement of as much as 2.3¢, which is the total tax at the present time." 22 F. P. C. 252, 257.

gain by the producer. The right of recoupment of a volumetric tax cost is established in Commission practice.

The fact remains, however, as the Commission concedes, that tax reimbursement is an item for bargaining between producer and pipeline company. As a result of such bargaining one pipeline company may agree to a 21.5-cent initial price but only partial reimbursement for taxes. In another contract (the instant case, for example) a pipeline company may obtain the same initial price but in order to do so may have to agree to full reimbursement for taxes at present rates. It is apparent that the second producer has obtained a better price than the first one, for it has been able to pass along all of its volumetric tax costs as a separate item.

It follows from this, we believe, that comparative tax reimbursement plans as well as comparative base rates ought to be taken into consideration in determining whether a proposed initial price is out of line. Except where the difference in tax reimbursement features is relatively insubstantial, it is our opinion that failure to take account of such a difference would be an abuse of discretion.

Summarizing on this branch of the case, we are of the view that with respect to the use for comparative purposes of prices presently under review and the failure to consider tax reimbursement features in making such comparisons the criteria employed by the Commission in fixing a line by which to test the proposed initial rates of Superior and California fall short of what is required under Cities Service and the Act. Since it was apparently upon the basis of a line so determined that the Commission ordered issuance of a permanent and unconditional (as to prices) certificate, we hold that the Commission abused its discretion in so doing and that the order must be set aside.

In view of the conclusion just stated it is not necessary to deal at length with the other arguments which have been advanced by Utah and New York. Since, however, further proceedings before the Commission will now be required, we briefly state our views on other questions which the Commission must again face.

Concerning the adequacy of the evidence to support the Commission findings, it is to be remembered that this is not a rate proceeding. Hence a comprehensive showing such as would therein be required is not necessary. Nevertheless, where the Commission relies upon existing certificated rates in establishing a line, evidence ought to be submitted concerning those rates. The contracts ought to be identified, and each should be subject to test as to arms-length bargaining, identity or similarity of gas production area, nature of gas reserves, quality of gas, facilities to be provided and services to be performed.

With regard to the factor of triggering of price increases, we find nothing wrong with the Commission finding that United's other contracts will not be substantially affected. They contain no "favored nation" clauses. The testimony as to a noncontractual "favored nation" policy concerning one customer does not seem to us of sufficient importance to undermine the Commission's finding. In any event the petitions for rehearing did not raise this question. Hence, in view of section 19(b) of the Act the point may not be raised here. Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 324 U. S. 635, 649, 651.

The Cato decision in discussing "triggering" refers not alone to possible increases in the applicant's rates, but to possible "general price rises." The Commission order appears to contain no finding as to whether the proposed initial prices might result in a triggering of general price rises.

The Commission order is vacated and the matter is remanded to the Commission for further proceedings consistent with this opinion.

(Endorsed) Opinion Filed Oct. 31, 1960.

FRANK H. Sc m, Clerk.

Appendix D.

Opinion of U. S. Court of Appeals, Tenth Circuit.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 6280—JANUARY TERM, 1961

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

SUNRAY MID-CONTINENT OIL COMPANY,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Intervenors.

On Petition to Review Order of the Federal Power Commission

[January 23, 1961]

Before BRATTON, PICKETT and BREITENSTEIN,
Circuit Judges.

BREITENSTEIN, Circuit Judge: This case is another incident in the controversy over the initial rates for the sale of natural gas by southern Louisiana producers to pipeline companies for transmission to the Philadelphia and New York areas. The Federal Power Commission (Commission) granted a certificate of public convenience and necessity

for the sale by Sunray Mid-Continent Oil Company (Sunray)[1] of natural gas produced in the Point Au Fer field, Terrebonne Parish, Louisiana, to Transcontinental Gas Pipe Line Corporation (Transco)[2] at an initial base price of 21.5 cents per thousand cubic feet (Mcf) plus reimbursement for Louisiana taxes in the amount of 2.05 cents per Mcf. The petition for review is brought by United Gas Improvement Company (UGI) which distributes gas in the Philadelphia area and which intervened in the Commission proceedings. Public Service Commission of the State of New York, an intervenor below, has intervened here on the side of UGI. Sunray and Transco also have intervened here and support the Commission. The controlling issue is whether in granting an unconditional certificate to Sunray the Commission satisfied the requirements stated in Atlantic Refining Co. v. Public Service Commission of New York, 360 U. S. 378 (CATCO).

In CATCO the Supreme Court considered a Commission order certificating sales of natural gas from southern Louisiana sources by four independent producers to Tennessee Gas Transmission Company at an initial base rate of 22.4 cents per Mcf. The Court remarked on the intent of Congress in the passage of the Natural Gas Act "to give full protective coverage to the consumer as to price" and mentioned the price controls found in §§ 4 and 5 of that Act[3]

[1] Sunray, a Delaware corporation having its principal place of business in Tulsa, Oklahoma, is a "natural-gas company" within the meaning of the Natural Gas Act, 52 Stat. 821-833 as amended, 15 U. S. C. §§ 717-717w.

[2] Transco, also a "natural-gas company," owns and operates a pipeline system which extends from southern Texas to New York City.

[3] 15 U. S. C. §§ 717c and 717d. Section 4 empowers the Commission to suspend a new rate schedule for five months, at the end of which period, if the rate has not been acted upon by the Commission, it may go into effect upon the posting of a bond to refund subsequently determined overcharges. Section 5 authorizes the Commission to conduct rate investigations but contains no provision for a bond to cover overcharges.

The sales considered in CATCO, like the sale here, required compliance with §7(c) and (e)[4] in order to be effective. The applicable provisions forbid such sales without the issuance by the Commission of a certificate of public convenience and necessity. Section 7 contains no provision for the suspension of a rate or for protection against overcharges but does empower the Commission to impose such terms and conditions as the public convenience and necessity may require.

The CATCO opinion holds that in a §7 proceeding a "just and reasonable" rate hearing is not a prerequisite to the issuance of a certificate. The Commission must evaluate "all factors bearing on the public interest." Price is "a consideration of prime importance." If the proposed price is not in the public interest because "it is out of line," because it may result "in a triggering of general price rises," or because it may bring about "an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." The Court pointed out that "the initial price will set a pattern in an area where enormous reserves of gas appear to be present," and set aside the order on the ground that there was insufficient evidence to support the required finding of public convenience and necessity.

After the CATCO decision the Third Circuit affirmed the Commission in United Gas Improvement Company v. Federal Power Commission, 3 Cir., 269 F. 2d 865. That case, to be hereinafter referred to as Transco-Seaboard, involved the certificating by the Commission of sales of southern Louisiana gas to Transco, the same pipeline company as is involved here.[5] The prices ranged from 22.4 cents to 23.55 cents. On certiorari the Supreme Court reversed summarily with directions to remand the case to the Commis-

[4] 15 U. S. C. §717f(c) and (e).

[5] As will be later noted, two of these sales were from the Point Au Fer field, the source of the gas covered by the instant application.

sion for reconsideration and redetermination in the light of CATCO.[6]

Before the CATCO decision, examiners for the Commission had conducted hearings on several applications relating to the sale of southern Louisiana gas. We are here concerned with one of those applications. The report of the examiner preceded CATCO. The order of the Commission was made after CATCO and after the Third Circuit decision in Transco-Seaboard but before the Supreme Court reversal of Transco-Seaboard. Two other applications which pertain to southern Louisiana gas and which were determined by the Commission under conditions similar to those presented here have now made their way through courts of appeals and have resulted in the rejection of the Commission order in each instance. These cases are The United Gas Improvement Company *v.* Federal Power Commission, 9 Cir., ... F. 2d ...., decided October 31, 1960,[7] and Public Service Commission of the State of New York *v.* Federal Power Commission, D. C. Cir., ... F. 2d ...., decided December 8, 1960. The Ninth and District of Columbia circuits agree that the records before them disclosed a failure of the Commission to meet the standards of CATCO because the rates were "out of line" and there was no showing of public convenience and necessity. The circuits further agree that the Commission had improperly used, for comparative purposes, prices which were under review and that "where a substantial number of certificated prices are thus under court or Commission review, like prices in the same area though not currently under review ought to be regarded as suspect."

There is an impelling reason to regard the price proposal in the case at bar as suspect. Transco-Seaboard

[6] In the Supreme Court the style of the case was Public Service Commission of the State of New York *v.* Federal Power Commission, 361 U. S. 195.

[7] This case involved sales of gas produced in Terrebonne Parish, the parish in which the Point Au Fer field is located, at a base price of 21.5 cents per Mcf plus tax reimbursement of 2.3 cents per Mcf.

involved two sales of gas from the Point Au Fer field to Transco,[8] and Sunray, the applicant here, had an interest in some of the wells from which would be produced the gas covered by the sales.[9] In view of the summary reversal of Transco-Seaboard it would be presumptuous on our part to say that the sale here from the same field and at the same price as one sale from that field involved in Transco-Seaboard is "in line" and in accordance with public convenience and necessity.

The price comparisons made in the case at bar are subject to the same criticism as was made by the Ninth Circuit and agreed to by the District of Columbia Circuit. With few exceptions they involve applications pending before the Commission or on review in the courts. At least until some final disposition of the CATCO and Transco-Seaboard applications, all of the prices submitted must be regarded as suspect.

Counsel for the Commission have submitted a memorandum containing the Commission's "STATEMENT OF GENERAL POLICY NO. 61-1—Establishment of price standards to be applied in determining the acceptability of initial price proposals and increased rate filings by independent producers of natural gas," issued September 28, 1960, and the first amendment thereto issued October 25, 1960. These statements are said to show a Commission policy to "hold the line" on initial prices that conforms with CATCO. While the Commission order now under review must be judged on the basis of the record made before the Commission[10] and these statements are not in that record, nevertheless the submitted statements are used

[8] In one of these the price was 21.5 cents per Mcf plus tax reimbursement of 2.05 cents per Mcf. In the other the base price was 21.5 cents and the tax reimbursement 1.8 cents.

[9] This application came too late to be consolidated with the hearings which resulted in the orders reviewed in Transco-Seaboard.

[10] Securities and Exchange Commission *v.* Chenery Corporation, 318 U. S. 80, 87.

by UGI and PSC to sustain their positions. The first statement lists prices by geographical areas but omits the listing of initial prices for southern Louisiana and Mississippi. The reason assigned for this omission is that the proper initial price level for these areas is subject to hearings pursuant to Supreme Court decisions. This is an implied admission by the Commission that at the date of the statement it had not determined the "line" for initial prices in the two areas. The amendment fixes a price of 21.5 cents per Mcf for southern Louisiana and Mississippi,[11] but says that such action is not "a prejudgment of the cases presently being reconsidered separately by us upon remand from the Supreme Court." In such circumstances, the price stated does not rise above the "suspect" class criticized in the decisions of the Ninth and District of Columbia circuits.

We are convinced that the record fails to show that the proposed initial price is "in line." It is conceivable that in some circumstances public convenience and necessity may require the certificating of a sale when the price is "out of line." The record shows no such situation here. It shows a willing seller and a willing buyer arriving at a contract price through arms length bargaining. This is not enough to show that public convenience and necessity requires the issuance of a certificate. The only additional evidence is the statement by a Transco officer that Transco needs the supply to sustain its inventory and to meet the ever-increasing demands of its customers.[12] All this sketchy

[11] This price is apparently exclusive of tax reimbursement.

[12] The complete testimony in this regard was: "Transcontinental is now using nearly one-half trillion feet of reserves each year to meet the requirements of its customers. To maintain the inventory of our system gas supply at a satisfactory level in the face of such annual depletion and the ever-increasing demands of our market customers, it is essential that we continually acquire new gas reserves. Further, whenever we find available to us upon the same or substantially the same terms, material additional reserves in fields where we are already certificated to buy gas, we consider it to the benefit of our company and our customers to buy such additional gas. The Sunray reserves at Pointe au Fer fall into this category."

evidence does is to show a need by Transco. It falls far short of establishing that the sale is in the public interest.

We see nothing in this case which demands a different disposition than that made by the Supreme Court in the Transco-Seaboard case or by the Ninth and District of Columbia circuits in the mentioned cases which they have decided.

The Commission order is vacated and the cause is remanded to the Commission for further proceedings consistent with this opinion.

Appendix E.

Three Opinions Including Judge Brown's Dissent, of U. S. Court of Appeals, Fifth-Circuit.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18112

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION.

(February 22, 1961.)

Before TUTTLE, Chief Judge, and BROWN and WISDOM, Circuit Judges.

TUTTLE, Chief Judge: This case presents the identical problem heretofore resolved by the Courts of Appeal for the 9th Circuit in *United Gas Improvement Co.* v. *F. P. C.*, ... F. 2d ....., and the District of Columbia Circuit in *New York Public Service Commission* v. *F. P. C.*, ... F. 2d ....., decided December 8, 1960, 20 Law Week, 2273, and now pending after argument in a companion case in the 10th Circuit. Petitioner here also contends that it has been resolved by the United States Supreme Court by directing

a reversal (see 361 U. S. 195) of the 3rd Circuit decision in *United Gas Improvement Company* v. *F. P. C.*, 269 F. 2d 865.

The issue is whether the Commission erred in granting a certificate of public necessity and convenience without condition to Sun Oil Company authorizing it to sell gas produced from the Belle Isle Field in Southern Louisiana at an initial base price of 21½¢ per Mcf, plus reimbursement of Louisiana severance and gathering tax of 2.3¢ per Mcf, plus 75% of any new taxes thereafter imposed. The issue must be resolved by a determination whether the Commission observed the standards requiring the "most careful scrutiny and responsible reaction" which the Supreme Court said is required to be given by the Commission to "initial price proposals under Section 7" of the Natural Gas Act, 15 U. S. C. A. §717(f). *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U. S. 378, 391.

Not only the deference due the studied and careful conclusions of the two other Courts of Appeals, but on our own study of the Atlantic Refining Company case (now known throughout the industry as the CATCO case) compels us to conclude, as the other courts did, that the record before us does not support the determination that the certificate of public necessity and convenience should unconditionally issue in light of the strictures in the CATCO decision.

The essential facts developed in the record before us are: The Sun Oil Company filed an application on May 19, 1958, under Section 7 of the Natural Gas Act, seeking a disclaimer of jurisdiction or in lieu thereof a certificate of public convenience and necessity authorizing the sale of natural gas to the United Gas Pipe Line Company (United) from Sun's onshore production in the Belle Isle Field, St. Mary Parish, Louisiana. Sun is a New Jersey corporation. Its principal place of business is located at Philadelphia, Pennsylvania. Its application was numbered G-15122.

The United Gas Pipe Line Company also filed an application on May 19, 1958, under Section 7 of the Natural Gas Act, seeking a certificate of public convenience and necessity authorizing it to construct and operate certain

facilities, estimated to cost $1,176,175.00, to connect with its presently existing natural gas transmission system, which would enable it to purchase, receive and transport in interstate commerce the natural gas produced by Sun in the Belle Isle Field in St. Mary Parish, Louisiana.

By an order issued on January 5, 1959, the Commission permitted the interventions of United Gas Improvement Company and Public Service Commission of New York.

As provided in the Commission notice dated November 26, 1958, a hearing was convened on December 30, 1958, but, on account of the petition to intervene by U. G. I. and the notice of intervention by PSC-NY, was recessed to January 27, 1959, on which date a formal hearing was held and concluded.

The source of the natural gas to be produced by Sun and sold to United, if certificated herein, is from leases or other interests in minerals owned or controlled by Sun in the Belle Isle Field, St. Mary Parish, Louisiana. No gas is to be purchased by Sun from third parties to effectuate this proposed sale. The Belle Isle Field is not a new discovery. The discovery well was drilled in 1940. Since then Sun has drilled some sixty-five or more wells in this field; twenty-one were dry holes. The record shows that at the date of this hearing Sun had in this field eight producing gas wells, twenty-seven producing oil wells and ten temporarily abandoned wells that are to be recompleted as gas wells. There has been continuous exploration in the field since the discovery of the original gas well in 1940. The gas being produced in the Belle Isle Field is sweet, dehydrated gas, the major portion being gas well gas. Under the terms of the sales agreement Sun will dehydrate the gas being sold to United.

United submitted an offer to Sun for the Belle Isle Field gas early in February, 1958. After much negotiating and several bargaining sessions a sales agreement was executed in May, 1958. Each party to the sales agreement was willing and interested in concluding a contract but neither party was under any compulsion to do so. This record shows

no affiliation between Sun or United and the two companies have no common officers or directors. United says it conducted its negotiations, which culminated in an agreement, with the objective of purchasing the Belle Isle gas from Sun on terms suitable to United and at the lowest possible price.

United shows it has need of, and a demand for, this Belle Isle gas to meet the present and future requirements of its customers. United now delivers more than one trillion cubic feet of natural gas per year to its customers and the demand on it for additional natural gas increases each year. United agrees to pay, and Sun agrees to sell, the Belle Isle Field natural gas for an initial price of 21.5 cents per Mcf at 15.025 psia plus state taxes, which are shown to be 2.3 cents per Mcf, thus producing a total cost price to United of 23.8 cents per Mcf. The sales agreement provides for 2 cents increase in price per Mcf each four-year period of the twenty-year agreement until a total price of 29.5 cents per Mcf, plus tax, is reached. United says that Belle Isle Field is exceptionally well located for them since it is approximately 12 miles from a United 26-inch and a 30-inch main pipeline. Because of the proximity of this gas to its system main line United was anxious to acquire the total field production feeling it to be in the best interests of its customers by adding this sizable reserve.

The other sales agreements of United do not contain a "favored nation" clause, hence existing contracts will not be triggered into higher prices by this contract.

United contends, if they expect to purchase this gas, and they maintain they need it, that the demand upon them for additional gas supplies by their present customers requires them to purchase same for the public convenience and necessity, therefore in order to purchase this gas they would be required to offer Sun the current market price, or better, hence the 21.5 cents per Mcf offer.

United's system-wide average cost of gas in 1957 was estimated to be 11.7 cents per Mcf—a United witness testified it had probably gone up a cent or a cent and a half per Mcf in 1958—and this purchase of the Belle Isle Field

gas would increase this average cost by less than one tenth of one cent per Mcf. The intervenors contend any certificate issued by the Commission should be conditioned to a maximum of 17 cents to 18 cents per Mcf.

As we have previously stated in *Bel Oil Corp.* v. *F. P. C.*, 5 Cir., 255 F. 2d 548, 553, a price paid for gas as the result of arm's length bargaining with the producer is not, merely because bargained for in a highly competitive market, "just and reasonable" within the intendment of the Natural Gas Act. See also *New York Public Service Com.* v. *F. P. C.*, D. C. Cir., ... F. 2d ....., decided December 8, 1960, 29 U. S. Law Week 2272. This is so because the only justification for giving the Commission the duty to regulate prices was the determination by Congress that the producers have a supply that is so restricted in relation to demand that they have the economic power to bargain for prices that will be injurious to the public. "The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas." *F. P. C.* v. *Hope Natural Gas Co.*, 320 U. S. 591.

We consider the foregoing comment appropriate at the outset of the discussion of this case, because we perceive that most of the Commission's approach to the certification procedures, until stopped by the Supreme Court in CATCO, was subject to the same criticism which the Commission itself was successfully leveling at the producers in the Section 4 proceedings: that the Commission was permitting the initial filing prices to be fixed by the producers merely on a showing, *so far as price justification was concerned*, that they had been bargained for at arm's length, or that they were not higher than a price someone else was then paying in the area.

Thus, at the very threshold of the regulating procedure newly contracting producers were being permitted to charge prices for their gas that were in some instances 30% to 50% higher than earlier prices that were at the very time being suspended by the Commission pending hearings under Section 4 procedures. This inconsistency that concededly arose largely because of the sheer magni-

tude of the problem of processing the certification proceedings on any other basis, is what the Supreme Court brought in question and corrected in the CATCO decision.

This record discloses that United, the purchaser in this contract from Sun, had been purchasing gas in 1954 at from 9 cents to 12 cents per Mcf in the South Louisiana territory. The testimony of C. C. Barnett, Vice President of United in charge of the gas supply department, as to the move upward from that figure is significant:

> "Q. Well, it just seems to me that it can be simply stated that the new high prices do tend to establish new floors for prices. A. Well, I think that you are—you are probably correct in that. I won't go all the way to it, but in about 1954 we were buying gas in South Louisiana at around nine to twelve cents, and Gulf Interstate was certificated and they were paying the enormous amount of 20 cents.
>
> Q. That is the Erath Field, is it not? A. In the Erath Field. And of course they bought one big package. There was a trillion foot field and they wanted it. So they paid 20 cents for it then.
>
> About six months or a year later, American Louisiana came in, and instead of paying 20 cents for a trillion foot field they paid 20 cents for smaller fields. And there can be no argument about it that that had brought the price up."

This discussion by the responsible parties who fixed this initial price makes it perfectly plain that a substantial part of the increase from "nine to twelve cents" to 21½ cents resulted from the tremendously increased demand as contrasted with the available supply. In stating that this is plain from the record before us, we, of course, do not say that a substantial part of the increase may not also be attributable to increased costs, nor do we decide that the nine to twelve cents price was a just and reasonable figure. We do know that virtually every increase resulting from escalator clauses or from the operation of "favored

nations" provisions in existing contracts was being subjected, during this four year period, to Section 4 hearings for reasonableness.

Apart from any decision of the Supreme Court, it does not seem reasonable or consistent with any understandable policy of Congress that the Commission would, as an illustration, permit the filing of initial price of 20 or 20½ cents, resulting in the collection of that rate until set aside by a Section 5 proceeding (found by the Supreme Court and conceded by all parties to be practically ineffectual because of the volume of business under Section 4) and, on the same day, suspend an automatic increase under an escalation clause from 9 to 15 cents.

In dealing with this problem, the Supreme Court said in *Atlantic Refining Co. v. Public Service Commission, supra:*

> "In view of this framework in which the Commission is authorized and directed to act, the initial certificating of a proposal under section 7(e) of the Act as being required by the public convenience and necessity becomes crucial. This is true because the delay incident to determination in section 5 proceedings through which initial certificated rates are reviewable appears nigh interminable. Although Phillips Petroleum Co. v. Wisconsin, 347 U. S. 672, was decided in 1954, cases instituted under section 5 are still in the investigative stage. This long delay without the protection of refund, as is possible in a section 4 proceeding, would provide a windfall for the natural gas company with a consequent squall for the consumers. This the Congress did not intend. Moreover, the fact that the Commission was not given the power to suspend initial rates under section 7 makes it the more important, as the Commission itself says, that 'this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest,' 17 F. P. C. 563, 575.

"It is true that the Act does not require a determination of just and reasonable rates in a section 7 proceeding as it does in one under either section 4 or section 5. Nor do we hold that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates. What we do say is that the inordinate delay presently existing in the processing of section 5 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals of producers under section 7. Their proposals must be supported by evidence showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued. This is not to say that rates are the only factor bearing on the public convenience and necessity, for section 7(e) requires the Commission to evaluate all factors bearing on the public interest. The fact that prices have leaped from one plateau to the higher levels of another, as is indicated here, does make price a consideration of prime importance. This is the more important during this formative period when the ground rules of producer regulation are being evolved. Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued.

"There is, of course, available in such a situation, a method by which the applicant and the Commission can arrive at a rate that is in keeping with the public convenience and necessity. The Congress, in section 7(e), has authorized the Commission to condition certificates in such manner as the public convenience and necessity may require. Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or

an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary."

The parties here belabor the question: what is the "line" as envisaged by the Court in the language quoted above, "out of line" and "hold the line"? The principal question here is whether the line is established by proof of what others are paying under certificates that were either uncontested or were being appealed and are thus "suspect," or what others are paying based on such "suspect" rates, or what even unregulated intrastate purchasers are paying. We agree with much that is said in the Ninth Circuit opinion, supra, which is in turn adopted by the Court of Appeals for the District of Columbia:

"When an order certificating an initial rate is under court or Commission review, it is possible that the certificate may be eventually denied or price conditions may be attached. In our opinion an existing rate subject to such a hazard does not provide a reasonably reliable basis upon which to predicate a price line. In the event the existing rate is later modified or conditioned as a result of the pending proceedings the foundation of the line derived therefrom would be undermined. Moreover, the acceptance of questioned existing prices as a guide in setting the line might itself have the anomalous effect of creating a standard by which the questioned rates would then be judged.

"For the reasons indicated we are of the opinion that it would be an abuse of discretion for the Commission in establishing a price line to rely upon producer prices which are under such a cloud.

"We go further and express the view that where a substantial number of certificated prices are thus under court or Commission review, like prices in the

same area though not currently under review ought to be regarded as suspect. In such circumstances it would seem that such similar prices ought not to be relied upon in fixing a line except upon evidence and findings to the effect that they are not subject to the same infirmities which are under test in the pending proceedings."

We think it too plain for argument that the first court tested and court approved certificated sale at a price much higher than any theretofore certificated according to the standards found by the reviewing court to be consonant with CATCO will unquestionably breach "the line." Such, we think, would be the effect of our approval of the certificated price in this case.

We do not attempt to determine what the "line" is on this record. We have no doubt that in this case the price of 23½ cents per Mcf, including the tax reimbursement,[1] was out of line as the term was used by the Supreme Court. The only evidence on this record that supports such "out of line" price is the fact that it was negotiated at arm's length and was required by the intense competition. This, as we have said, is not enough. It was clearly incumbent on the proponent of such a rate to make some showing of the "reason why" (as it was expressed in the CATCO opinion) 21½ cents, exeluding tax, is a proper initial rate in 1958 when the parties were freely contracting in 1954 at half that figure.

We are fully aware of the criticism that has been leveled at any regulatory scheme that keeps sums now approaching

[1] It was testified and the Commission found that the 2.3 cents tax reimbursement was an element of bargaining. Thus, while it may represent actual reimbursement for taxes paid, it is an element of cost to the purchaser, and in negotiating contracts purchasers do not always agree to reimburse the entire tax burden. The agreement here to pay 21½ cents plus full reimbursement for currently collected taxes, was found by the Commission to be a new high rate for United and for the area.

three quarters of a billion dollars subject to refund pending final determination of just and reasonable rates. However, we take notice of the fact that the log jam is now breaking, as witness the decision in the Phillips Petroleum Company case, F.P.C. Op. #338, and it may be hoped that appropriate formulas for resolving the other section 4 cases may soon be forthcoming. The Commission is at least making a strong bid to that end by the publication of its Area Price Level schedules. See Statement of General Policy #61-1, issued September 28, 1960.

We conclude that the order here under attack must be set aside and the proceedings remanded for further appropriate action by the Commission.

It is so ORDERED.

BROWN, Circuit Judge: I dissent.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18113

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION.

(February 22, 1961.)

Before TUTTLE, Chief Judge, and BROWN and WISDOM, Circuit Judges.

TUTTLE, Chief Judge: The issue here presented is identical with that decided this same date in *United Gas Improvement Co.* v. *F, P. C.*, No. 18,112, in this Court. We conclude that for the reasons set out in that case the Commission erred in issuing an unconditional permanent certificate to the Superior Oil Company and Transcontinental Gas Pipe Line Company in the consolidated proceedings with an initial price of 21.4 cents per Mcf plus 75% of any new taxes to be levied (no state taxes are applicable because this is a supply of off-shore gas beyond the state boundaries). The record does not disclose that the Commission gave "most careful scrutiny" and responded with "most responsible reaction" to the

initial price proposals required by the Supreme Court in *Atlantic Refining Co.* v. *Public Service Com. of New York*, 360 U. S. 378, 391 (popularly known as the CATCO case).

As we have pointed out in the companion case No. 18,112, the record makes it clear that the finding of public necessity and convenience here is based too strongly on the fact that arm's length dealing and the effect of supply and demand required Transco to agree to the disputed price, rather than that the price had any relation to what might ultimately be found to be a just and reasonable price.

The certificating of a price that, as the Commission here agrees would probably be collected for several years without possibility of refund of any excess sums, does not, we think, comport with the teaching of the Supreme Court in the Atlantic Refining Company case. See also *United Gas Improvement Co.* v. *F. P. C.*, 9 Cir. ..... F. 2d ....., decided October 31, 1960, and *Public Service Com. of New York* v. *F. P. C.*, D. C. Cir., ... F. 2d ....., decided December 8, 1960.

The order of the Commission is VACATED and the proceedings REMANDED for further appropriate action.

BROWN, Circuit Judge: I dissent.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18112

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 18113

THE UNITED GAS IMPROVEMENT COMPANY,
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versus

FEDERAL POWER COMMISSION,
Respondent.

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION.

(February 23, 1961.)

Before TUTTLE, Chief Judge, and BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge, dissenting: With the score now four down and none to go[1] and eleven distinguished judges arrayed unanimously against but one, the prospect of a dissent is indeed a formidable one. To the usual one of likely ineffectiveness, it runs the additional risk of marking its author presumptuous, arrogant or ignorant. But with all the deference which this distinguished company of judges inspire, I cannot down the conviction that this decision, and the others on substantially the same record, are wrong. More than that, claiming that the duty to hold the line is imperative because the administrative process creaks with sluggish inefficiencies, the consequence of this action is to add to that delay. That would be a small price, I suppose, were something to be gained. But by the nature of things —and here the "thing" is the *voluntary*, non-compulsory nature of the *first* sale of gas by a producer in the midst of an insatiable expanding demand for gas—the evidence to be offered on remand to the Commission will perhaps have formal attributes making it more imposing, but in actuality it will be what is now known and proved. The Commission will not in fact be better informed on fact. It will merely have a record—probably stupendous in length, in size and number of exhibits and in avoirdupois weight[2]—to establish what it now knows and on which knowledge Congress

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[1] Public Service Commission of New York *v.* FPC, D. C. Cir., 1960 [No. 15461, Dec. 8, 1960], ... F. 2d ....., Public Service Commission of New York *v.* FPC, D. C. Cir., 1960 [No. 15412, Dec. 8, 1960], F. 2d ; United Gas Improvement Company *v.* FPC, 9 Cir., 1960, 283 F. 2d 817; United Gas Improvement Company *v.* FPC, 10 Cir., 1961 [No. 6280, Jan. 1961], F. 2d , announced subsequent to the preparation of the majority opinion; and finally the two cases of this Court.

[2] The target for criticism of delay and lumbering inefficiency as recent quasi public reports reflect, is generally the administrative agency. But judges hearkening unto advocates protesting the absence of record "proof" must bear some of the responsibility. The problem is of national concern. This is attested by the President's action on the recommendation of the Judicial Conference for the creation of a Permanent Conference on Administrative Procedure. Many share the hope that Chief Judge Prettyman, now active in the formulation of such a conference, will help lead us from a sometime-judge-made wilderness.

declared it was entitled to determine whether the public interest called for the certification of a new sale of gas for resale.

Running through the majority's decision are assumptions or conclusions which I regard as basic errors. The decision misapprehends what it was that CATCO condemned. The opinion mistakenly delineates the mission of the FPC and a reviewing court as one to hold down prices. It erroneously equates regard for the protection of the ultimate consumer with some character of duty to prohibit price increases. In doing so, it loses sight of the fact that neither the FPC nor a reviewing court—including even the highest one—has any power to digress from the statutory duty or standard. Discussing these standards, there is interlaced in every conclusion a confusion of the "just and reasonable" test for rates under §§4 and 5 with the requirement for certificating a new service that "is or will be required by the present or future public convenience and necessity * * *," §7(e).

It is this staggering administrative problem[3] which should itself make us cautious lest we add unwittingly to it. What we hold in these two cases, and that by our sister Circuits in the others, note 1, *supra*, is but the infinitesimal drop in the bucket—perhaps more accurately called a

[3] The FPC in its celebrated opinion No. 338 in the Phillips Petroleum Company rate case [September 28, 1960]. FPC took candid note of this. With 3,372 independent producers with rates on file plus 15,435 non-filing co-owners, the Commission had then to deal with 11,091 rate schedules with 33,231 supplements. At that time 3,278 rate increase filings of 570 producers were under suspension awaiting hearing. Unless staff and budget relief is granted, it will take 13 years to dispose of these 2313 cases. In the meantime another 6500 cases would have been filed. This led the Commission to summarize it this way. "Thus, if our present staff were immediately tripled, and if all new employees would be as competent as those we now have, we would not reach a current status in our independent producer rate work until 2043 A. D.—eighty-two and one half years from now. Of course, we could expect to improve our techniques and thus shorten the time required to process these cases. If we increased our efficiency one thousand percent, we would achieve current status in 1968—eight and two tenths years from now. * * *"

molecule out of trillions of cubic feet of gas. For if this unindicated additional evidence is required in these, so must it be in every one of the hundreds soon to follow if the ever increasing demand of consumers for more and more gas is to be met. The alternative, of course, is to impose some sort of price condition on every certificate. But that is not administration under law. That is the mechanical application of an arbitrary practice as the easy way out.

I do not think *CATCO* had any such consequences in mind.

Worse than creating this administrative Jack-and-the-bean stalk, the requirements of the majority, adopting especially those voiced by the Ninth Circuit, see note 1, supra, brings about an administrative impasse. A local distributing company such as UGI and PSC, whether possessing an opportunity to intervene "as a matter of right," or not, have it within their power to prevent any rate from being considered by the FPC as evidence of an existing "line." If they are allowed to intervene, they may appeal the FPC certification as they have done here. Pending the decision of the appeal, that purchase—because it is somehow under a cloud or is "suspect"—has no legal existence as evidence. If intervention is denied for the reason, say, that the likely impact of such rate on any such distributor is too remote, then that rate may not be used as evidence of the line simply because the one challenging the instant rate was denied the right to attack the prior rate offered as evidence of the line. It is no answer to say that this infirmity terminates when the appellate process in such instances is completed. In the meantime, the current applicant for certificate can get nothing. He may not use the other rates to prove the increased "line." That means, of course, that the line will remain static, that it may never increase. If *CATCO* purports to forecast that as a necessary result, I find no basis in the Natural Gas Act for it.

This Court as much as declares that this is required. For the key to its opinion is likely found in these words:

"We think it too plain for argument that the first court tested and court approved certificated sale at a price much higher than any theretofore certificated according to the standards found by the reviewing court to be consonant with CATCO will unquestionably breach 'the line.' Such, we think, would be the effect of our approval of the certificated price in this case."

That has disturbing implications. Does it mean that we have some mission not to decide a case lest it be capable of subsequent use as evidence of a higher "line"? If, as the Court puts it, "the standards found by the reviewing court to be consonant with CATCO" forbid, as the majority and these other cases hold, reliance upon any increased price until such certification is court-approved, how may there ever be a price higher than pre-CATCO?

The fundamental error in all of this is that it is a court intrusion on the expertise committed by Congress to the FPC. Nothing under §19(b) of the Act makes FPC action a nullity while it is being challenged in court. The record of this Court in denying applications for stay in rate orders shows that we regard Commission decisions as of continuing vitality unless some strong circumstance compels holding them in abeyance. Tennessee Gas Transmission Co. v. FPC 5 Cir., 1960, 283 F. 2d 729. Just what is there about this which withholds the imprimatur of law until the judge has spoken? Does the whole machine stop when an appeal is taken? In the meantime, what happens to the Commission's serious duty to consider the imperative public interest in obtaining an assured supply to satisfy the insatiable demand for more and more gas?

Of course, I may not ignore the emphatic importance which *CATCO* attributes to price. But what that case had to deal with reflects no purpose in what was there said to make the §7 public convenience standard one merely of a simple arithmetical inquiry: is this price higher? Nor was it intended that if the answer were "yes" that that automa-

tically made it contrary to public convenience and necessity thereby setting automatically in train the price condition.

CATCO came up on a bare bones record with some macabre-like implications. There was no proof whatsoever of the need for the gas, the likelihood that it would be lost to the interstate market if the sale were not certificated, or the relation of the proposed 21.5¢ mcf price to others. Worse than that, it showed that twice the Commission was so disturbed about price that it imposed a price condition. This was followed by its final order in which, under the coercive economic pressures which the nature of this Act gives to non-jurisdictional producers, it capitulated presumably out of regard for what it considered was an imperative need for this large gas supply.

It was this apparent legal indifference to price as an element which was condemned by what the majority calls the "strictures" of *CATCO*. The element must be taken into account and this "requires a most careful scrutiny and responsible reaction to initial price proposals of producers under §7." 360 U. S. at 391. While rates are not the only factor under §7(e), the historic increase in the cost of gas "does make price a consideration of prime importance." 360 U. S. at 391. This leads the Court to conclude that "Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued." 360 U. S. 391.

But this was certainly no declaration as the law of the Medes and Persians which altereth not, that a price ostensibly higher than the last one ipso facto "signals the existence of a situation • • • not • • • in the public interest • • •." Nor is that to be found in these later comments of the Court. "Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." 360 U. S. at 391.

A price may be higher and yet quite "in line." If thus "in line" it does not come within the category condemned by the Court as one "not in keeping with the public interest." And it is at this point that the nature of the administrative function and the nature of the judicial function be carefully distinguished. What is "out of line" is primarily for the judgment of the administrative agency charged with the effectuation of the total policy of Congress. *CATCO* now requires that responsible inquiry be made by the FPC. But *CATCO* does not undertake to spell out just *what* the line is or *how* the Commission is to go about determining it. The term "out of line"—nowhere found in the Natural Gas Act—is a handy colloquialism which, if it means anything at all, must convey the connotation of the more familiar term "abuse of discretion"—i.e., is the proposed increase so great as to indicate arbitrary action without reasonable support in the practicalities of the regulated gas industry?

Obviously the Court could not have meant the term to be, as a matter of law, any price which exceeds in any degree the last and highest one. For that would have been to ignore the unique rate mechanism of the Natural Gas Act which commits rate *fixing* to the gas producer. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 1956, 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373, *United Gas Pipe Line Co.* v. *Memphis Light Gas and Water Div.*, 1958, 358 U. S. 103, 79 S. Ct. 194, 3 L. Ed. 2d 153. While any such increase is subject to limited suspension and collection under bond under §4 and is always subject to review under §5, automatic stepped up escalation increases become the legally effective rate. The "going rate" is therefore more than the last and most recent §7 certification of a new sale. It must take into account the geographically relevant currently collectible rates under long existing certificates or rate schedules. This, of course, calls for the nicest of delicate judgments running the whole gamut of the gas industry on the type or kind of gas, the area, field, production problems, volumes and the like.

It is inescapable that there will always be some difference—if not on the day of certification, then at some future

time as this complex of thousands of rates undergoes its automatic undulations. The question then is: *who* is to measure the difference? More important, *who* is to determine whether the difference is too much?

The Commission, with the teaching of CATCO before it, considered that these sales were required by the public convenience and necessity and when contrasted with comparable sales, the price was not out of line. Now the majority holds that there is no evidence to support it and remands the case either for more evidence or the imposition of some unindicated conditions. The Court is vague as to the infirmities of the proof. It points out that United's system-wide average cost was 11.7¢ mcf and that United had been purchasing gas in 1954 at a price from 9 to 12¢ mcf. With so much water over the dam since 1954, I am at a loss to understand how that year has anything to do with a "line" in 1958. Actually, as the opinion reflects in the quoted testimony from United's Vice President, that year marked the beginning of 20¢ gas under certifications for new sales of huge volumes.[4]

While I have some trouble in discerning just what it is the majority concludes, it does not seem likely that it considers this difference of 1½¢ between 20¢ and 21.5¢ as itself "out of line." Somehow the Court wants to ignore the actual fact of those significant certifications which obviously had an influence in subsequent price levels.[5] It concludes that we must go back to 1954 when it says:

> "The only evidence on this record that supports such 'out of line' price is the fact that it was negotiated at arm's length and was required by the

[4] This refers to the certificates issued in 1953 and 1954 in the Matter of Gulf Interstate Gas Company, Docket No. G-2058, opinion 251, 12 FPC 116, May 20, 1953; and the Matter of American Louisiana Pipe Line Company, Docket No. G-2306, opinion 276, 6 PUR 3d 476, October 1, 1954.

[5] UGI and PSC acknowledge that the price level increased to at least 17¢ and it is a rate of 17¢ to 18¢ which they suggest as a price condition. They do not, therefore, insist on rolling it back to 1954.

intense competition. This, as we have said, is not enough. It was clearly incumbent on the proponent of such a rate to make some showing of the 'reason why' (as it was expressed in the CATCO opinion) 21½ cents, excluding tax, is a proper initial rate in 1958 when the parties were freely contracting in 1954 at half that figure."

Two questions immediately arise: first, how did the Court reach this legal conclusion? Second, what sort of hearing is contemplated on the remand, i.e., what kind of evidence will constitute the "showing of the 'reason why' "?

The first is the more readily answered. Running throughout the Court's opinion is the confusion of the "just and reasonable" standard for rates under §§4 and 5 with the public convenience and necessity test of §7. It emphasizes this by stating of our decision in *Bel Oil Corp.* v. *FPC*, 5 Cir., 1958, 255 F. 2d 548, 553, that "A price paid for gas as the result of arm's length bargaining with the producer is not, merely because bargained for in a highly competitive market, 'just and reasonable' within the intendment of the Natural Gas Act." Presumably it is on this that the Court knocks out the undisputed evidence and the categorical finding of the Commission that these contracts were consummated after vigorous, genuine arm's length bargaining. But *Bel Oil* must be read in the light of our subsequent opinion in *Forest Oil Corp.* v *FPC*, 5 Cir., 1959, 263 F. 2d 622, which recognizes that the Commission in a rate proceeding is entitled to consider area or field factors.[6]

[6] There we said: "If the Commission finds that a rate is reasonable to the consuming public it need not reject such rate as not being just and reasonable merely because it will not yield to a particular producer more than the very minimum required by constitutional standards or more by way of net yield than is returned to another producer in the same well or field, especially if such result follows from a considered decision by the Commission that a uniform price for all the producers or a single well or a single field is not only reasonable but is also highly desirable for convenience of administration. This is what the Commission did in Order No. 310 [Pan American Petroleum Corporation et al]."

And, of course, no one questions that the price involved here is the area price.

But apart from the intrinsic standard to test "just and reasonable" the majority treats the certification problem as though it were a rate hearing. It does this in the plainest of words. It likens the CATCO criticism of FPC to the Commission's criticism of §4 rate increases substantiated only by showing of arm's length bargaining and a competitive field price. It follows this with the statement, "Thus, at the very threshold of the regulating procedure newly contracting producers were being permitted to charge prices for their gas that were in some instances 30% to 50% higher than earlier prices that were at the very time being suspended by the Commission pending hearings under Section 4 procedures. * * *" That, in turn, leads it to this main conclusion: "Apart from any decision of the Supreme Court, it does not seem reasonable or consistent with any understandable policy of Congress that the Commission would, as an illustration, permit the filing of initial price of 20 or 20½ cents, resulting in the collection of that rate until set aside by a Section 5 proceeding * * * and, on the same day, suspend an automatic increase under an escalation clause from 9 to 15 cents."

This idea of a field or area price now seems to bear fruition in the Area Price Levels Schedules set forth in the statement of General Policy No. 61-1 September 28, 1960, amended to include South Louisiana October 25, 1960, and now promulgated in the form of an official regulation, see

Our decision and opinion in that case strongly influenced the Commission in the Phillips Petroleum Company decision opinion No. 338, note 3, supra, in which it abandons the effort to determine rates on the fair rates of return point of departure theory of City of Detroit v. FPC, D. C. Cir., 1956, 230 F. 2d 810. As to this, it said, "If this contention is correct, then, as a practical matter, adequate regulation of producers appears to be impossible under existing law.

"Nowhere in the Natural Gas Act is there as much as one word which indicates that this Commission must use a rate base in determining just and reasonable rates. The correct construction of the Natural Gas Act on this question, both as a legal and as a practical matter has been made by the Court of Appeals of the Fifth Circuit in Forest Oil Corporation v. FPC * * *."

Presumably the majority states "Apart from any decision of the Supreme Court" purposefully. For surely CATCO does not warrant any such conclusion. On the contrary, that decision sought to make very clear that the two problems were quite distinct and that price was not to be measured in terms of "just and reasonable." The Court states, "It is true that the Act does not require a determination of just and reasonable rates in a §7 proceeding as it does in one under either §4 or §5. Nor do we hold that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates." 360 U. S. at 390-91.

Apart from the CATCO decision the statute itself bears evidence that different things are involved in §4, §5 and §7. It is not for us to say that Congress ought to have made all of the elements of these three sections and the balance of the Act consistent. The standard for a new service or a new sale is not that the proposed price is "just and reasonable" but that the proposed service at the proposed price "is or will be required by the present or future public convenience and necessity." That can account for quite dissimilar actions as between an application for a new certificate and a request to increase a rate under an old one. In the one the standard is public convenience and necessity. As to that, rates are not "the only factor bearing on the public convenience and necessity, for §7(e) requires the Commission to evaluate all factors bearing on the public interest." 360 U. S. 391. In the other the inquiry is what rate is "just and reasonable"?

One thing which surely makes a vital distinction is the difference between the power and the function of the Commission in the one as compared with the other. As to a sale under an existing certificate the gas is dedicated to jurisdictional use for the life of the reserves. *Sun Oil Co.* v. *FPC*, 1960, 364 U. S. 170, 80 S. Ct. 1388, 4 L. Ed 2d 1639; *Sunray Mid-Continent Oil Co.* v. *FPC*, 1960, 364 U. S. 137, 80 S. Ct. 1392, 4 L. Ed. 2d 1623. The Commission need not concern itself with the availability of that supply of gas. What, and all it need consider, is the price which will be just and reasonable to producer, consumer and the public alike.

What a different function it bears as to a proposed new sale. A new and perhaps overriding consideration now comes into play. That is the demand for gas. Here it is no longer the relatively "simple" task of drawing the line of just and reasonable. Now the question is not how much to pay, but how badly is this gas needed? At this point it is not for judges to rewrite the law. This may appear to give gas producers an economic ax. But that is the way the law was written. Until the sale is certificated, there is "nothing illegal in the [producers'] rejection of the alternative price proposed by the Commission and their standing firm on their own." 360 U. S. at 388.

Of course, CATCO now teaches that the Commission may not be overridden completely by this "overriding" consideration. If the price insisted upon is one which the Commission after careful consideration thinks will work a real wrong on the public interest, the minimum it must do is issue a conditional certificate. But there is in this a risk to the vital public interest. Insistence on a price condition in a borderline case may result in the producer withdrawing the application altogether. It is easy to say that if that happens, all well and good, because no one should be given that much power over the control of precious natural resources so badly needed. But what American industry and its exploding metropolitan-based population needs is not such politico-economic platitudes. What it needs is gas. And it is initially in the hands of the Commission to determine whether gas tentatively proffered is finally to be delivered. The risk to the public interest in the possible withdrawal of proposed sales becomes only more acute if, as UGI and PSC urge, and this Court now holds, the Commission should automatically impose a price condition if a price proposed in 1960, or 1970, or 1980 is greater than 1954.

If there ever was a place where truly it could be said that this called for the most expert judgment of those skilled in the problem, this must be one. Not only does it call for a nice balancing of demand and need against possible price impact, but it necessarily calls for a prescience as to the future. *United States* v. *Detroit & Cleveland Navigation*

Company, 1945, 325 U. S. 236, 66 S. Ct. 75, 90 L. Ed. 38. We are dealing with long term contracts which are long term whether so written or not, *Sun Oil Company* v. *FPC*, 1960, 364 U. S. 170, 80 S. Ct. 1388, 4 L. Ed. 2d 1639. When faced with the problem in 1961 of securing for the interstate regulated market gas reserves in the trillions of cubic feet that will be producing in the year 1980, and conceivably in the year 2000, when our population will be 272,557,000[7] and over 350 million, I doubt seriously that the Supreme Court meant to declare for all time that a cent or two cents difference between the proffered price and the most recent one, must compel the Commission to risk the loss of this urgently needed gas.

What I am saying is that this must be a judgment for the Commission. Judgment is more than a simple arithmetical comparison of two prices. A considerable latitude must be granted the Commission. This may be safely done for if, in a twilight zone case, the Commission determines that the public interest is best served by securing a perpetual dedication of the gas reserves, it still has the potent remedy of a §5 hearing. If the Commission is not occupied and preoccupied with useless hearings of the kind we now order, I am confident that it could, with some needed help from Congress for an adequate staff, proceed to expeditious decision on the issue of "just and reasonable" rates.

So we come, as they say in field notes, to the place of beginning. What sort of hearing is to be had on remand?

Surely it will be an affectation to have further proof on the imperative need of United and Transco for this gas. This was no CATCO record. Here the proof abundantly shows the extent of their needs and the supply to satisfy those needs. In the *Sun* case the reserves are calculated to be 372 billion cubic feet. Sun is dedicating 10,259 acres to the performance of the agreement with United. The majority repeats verbatim with apparent approval the Commission's finding that "United shows it has need of,

[7] Statistical Abstract of the United States 1960, No. 3, *Projections of the Total Population*, at p. 6.

and a demand for, this Belle Isle gas to meet the present and future requirements of its customers. United now delivers more than one trillion cubic feet of natural gas per year to its customers and the demand on it for additional natural gas increases each year." As to the sale by Superior to Transco, the evidence supports without any serious attack all of the Commission's conclusion. "Transco currently uses approximately one-half trillion cubic feet of natural gas per year. The Superior reserves will meet Transco's system supply for about six months, thereby assisting the company to maintain the inventory of its system gas supply in the face of heavy annual depletion and ever-increasing annual demands by Transco's customers." Superior "owns approximately 30 percent of the dedicated reserves in" this off shore field and by its acquisition of the reserves "Transco has been able to acquire what in the opinion of the company is probably the largest single reserve ever contracted by Transco." The "facts disclose that Southern Louisiana is the only area in which Transco has been able to acquire substantial volumes of uncommitted reserves during the past two years. It has sought unsuccessfully to acquire additional reserves at an initial price of 17c, and is obliged, if it is to continue to meet the customer requirements it has undertaken to meet, to pay producers in Southern Louisiana a price which will induce them to sell the gas."

What then about the price? What sort of evidence will there be, and what in reality will it teach, as a "showing of the 'reason why' • • • 21½ cents • • • is a proper initial rate in 1958 when the parties were freely contracting in 1954 at half that figure."?

There may be good basis for deploring it, for wishing that it had not come to pass, but there can be no doubt as to why 21½c was agreed upon as the price in 1958. That was the result of the ever-increasing demand for gas and relative lack of supply. This is the result of an interplay of several factors, all of which must be known to the Commission. The first is the tremendous post-war investment in long line transmission system. Billions of dollars

have been spent to bring this gas to metropolitan and industrial markets.[8] Gas which, before the war, had little economic value, has increasingly been the subject of an ever-growing demand. The more pipelines built, the more the consuming areas have converted to gas. The greater the conversion, the more the demand.

Had this operated in a traditional public utility field, regulation of the price would have restrained the impact of demand on supply. Here comes into play the second factor. We are not really dealing with a service. An "independent producer," Mr. Justice Harlan pointed out, "is unique among the objects of public-utility regulation because it is not engaged in rendering a service to the public in the conventional sense of that concept, but rather simply in selling a commodity which it owns. * * *" *Sunray Oil Co. v. FPC*, 364 U. S. 137, 160 (dissenting). The producer is free of regulation until he sells and is certificated. No one may compel him to sell. He has no duty to sell at a "just and reasonable" rate. Indeed, an operator *vis-a-vis* his co-owners probably has the legal duty to exact what the traffic will bear. As it is entirely a voluntary thing whether a person wishes to subject himself and his specific gas reserves to public regulation, that decision is normally determined by *price*. Third, as between prospective purchasers, and especially long line transmission systems, there is no public authority to determine who shall have the right to procure gas from a prospective producer-seller. That means that to meet the increasing demand resulting from their expanded facilities (factor one above), the public utility buyers now compete with one another in obtaining gas from the free agent—the producer under no compulsion to sell. Finally, there is competition by intrastate users, and non-jurisdictional industrial users. *FPC v. Transcontinental Gas Pipe Line Corp.*, 1961, ... U. S. ....., ... S. Ct. ....., ... L. Ed. 2d ..... [January 23, 1961, Nos. 45 & 46].

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[8] I do not for the moment suggest these expenditures constitute an element of the producers' fair price, whether on a rate base or otherwise.

The proof was uncontradicted that United and Transco had tried earnestly to obtain these needed major supplies of gas at a lower price. They were unsuccessful because this was now the market. No one doubts the sincerity or truthfulness of these witnesses. No one has even faintly suggested that there will be found any witness any where who will say that gas in those volumes under these conditions will be obtainable in Southern Louisiana at the figure now suggested by UGI and PSC of 17-18¢ mcf.

What good then is to be served by a hearing? How can there be any other explanation of the "reason why" gas cannot be purchased in 1958 at 1954 prices? Is the need for a record to substantiate administrative action so much a legal formalism that we compel an overworked and understaffed agency to hold a hearing that will only gild the lily?

Things would be different had the Commission, as it did in CATCO, capitulated on the element of price. Here against a known, informed judgment born of long experience and knowledge of the general price levels in the neighborhood of 20¢, it reached the conclusion that this price was consistent with the public convenience and necessity. All of the elaborate evidence, charts and exhibits, economic studies, estimates of gas reserves, and the like cannot possibly change the picture which it knew at the time these orders were entered and which it has known all along.

I look at this as though I were sitting in the Commission's seat. Faced with our order of remand "for further appropriate action," what action should be taken? Hold a hearing to develop what is already known? Hold a hearing to determine that the inevitable is really so, and that producers are free to offer or not offer gas for sale at the current market price? Or is this intended merely as an invitation to impose automatically some kind of price condition? If so, where will it be fixed? Where does the figure 17-18¢ proposed by UGI and PSC come from? Finally, the Commission can well ask, how are we ever to catch up with the staggering load of §4 and §5 proceedings

if to that burden we must now add two others—a full dress rehearsal hearing for every certification or the equivalent of a §4 suspension proceeding through the guise of a price condition?[9]

I am confident of only one thing: this case will be back several years and thousands of pages later. No one will know more than is known now.

I therefore respectfully dissent.

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[9] To be effective as a protection for the consumer and at the same time assure ultimate collection by the seller of a "just and reasonable" rate from the time of commencement of the service by the conditional certificate would probably take the form of a specified price with a right to file for an immediate increase with or without the five-months' suspension under §4. This would then take its place with all of the other §4 proceedings. During fiscal 1959 the Commission suspended 1,091 rates. At that year end rate filings suspended totaled 2,323. FPC, *Thirty-Ninth Annual Report*, p. 82 (1959). The FPC's brief tells us that the revenue increments representing the difference between the contingent rates and prior rates exceeded $110 millions in fiscal 1959. Forty percent of gross revenues collected are under §4 suspension.